

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 464

CHESTER BOWLES, AS ADMINISTRATOR OF THE
OFFICE OF PRICE ADMINISTRATION, APPELLANT

vs.

MRS. KATE C. WILLINGHAM AND J. R. HICKS, JR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE MIDDLE DISTRICT OF GEORGIA

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Appearances

[Omitted in printing]

2-3 In the District Court of the United States for the
Middle District of Georgia, Macon Division

Civil Action No. 238

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION

vs.

Mrs. KATE C. WILLINGHAM and J. R. HICKS, Jr.

Docket entries

July 20, 1943—Filing Complaint and Issuing Summons.

July 20, 1943—Filing Rule Nisi, returnable July 24, 1943.

Aug. 4, 1943—Filing Answer and motion to Dismiss of Mrs. Kate C. Willingham.

Aug. 4, 1943—Filing Answer and Motion to Dismiss of J. R. Hicks, Jr.

Aug. 16, 1943—Filing Amendment to Complaint and Order allowing same.

Aug. 30, 1943—Filing Amendment to Answer and Motion to Dismiss of Mrs. Kate C. Willingham and Order of Court allowing same.

Sept. 1, 1943—Filing Order of Court dismissing action.

Sept. 14, 1943—Filing Motion for Amendment of Order of September 1, 1943, and amended order of Court.

4 In the District Court of the United States

[Title omitted.]

Complaint

Filed July 20, 1943

1. In the judgment of the Price Administrator defendant Mrs. Kate C. Willingham has engaged in acts and practices which constitute violations and attempted violations of the Emergency Price Control Act of 1942 (hereinafter termed the Act), the same being also violations and attempted violations of Maximum Rent Regulation No. 26 (hereinafter termed the Regulation), which prescribes maximum rents permitted to be charged for the use and occupancy of housing accommodations other than hotels and

rooming houses within the Macon, Georgia, Defense Rental Area, and among other things provided that where housing accommodations are rented for the first time after April 1, 1941, the Administrator shall determine by proper investigation whether or not the amount of such rent is higher than the maximum rent generally prevailing in the area for comparable housing accommodations on April 1, 1941, and in the event such rent is higher than such standard, to adjust the amount of such rent to an amount which will be no greater than that permitted by such standard.

2. The Price Administrator brings this action pursuant to Section 205 (a) of the Act to restrain violations and attempted violation of, and to enforce compliance with, said Act and said Regulation as amended.

3. Jurisdiction of this action is conferred upon the Court by Section 205 of the Act, as well as the general equity jurisdiction of this Honorable Court.

4. On or about April 28, 1942, the Price Administrator, pursuant to the authority vested in him by Section 2 (b) of said Act, did make, issue, and promulgate an order designating the counties of Bibb, Houston, and Peach within the State of Georgia as a Defense Rental Area.

5. On or about July 1, 1942, plaintiff's predecessor, Leon Henderson, as Price Administrator, pursuant to the authority vested in him by Section 2 (b) of said Act, did make, issue and promul-

gate Maximum Rent Regulation No. 26, effective July 1,

1942, which Regulation provides within said Defense

Rental Area, among other things, for the establishment of maximum rentals permitted to be charged for the use and occupancy of housing accommodations other than hotels and rooming houses within said Area, and further, made provisions for the adjustment of rentals in certain instances as hereinbefore described.

6. Defendant Mrs. Kate C. Willingham, as landlord of certain premises located at No. 20 Arlington Place, Macon, Georgia, did after April 1, 1941, rent three units of housing accommodations on said premises at \$60.00, \$40.00, and \$37.50 per month, respectively. Thereafter, under the authority of said Act and said Regulation Andrew J. Lyndon, Area Rent Director acting for and in behalf of the Administrator, did make an investigation of said described housing accommodations and did, on or about June 14, 1943, pursuant to authority vested in him, issue and forward to said defendant written notice to the effect that the amount of such rentals was in excess of that generally prevailing in said Area for comparable accommodations, and advised that said Rent Director proposed to decrease such rents from \$40.00 to \$27.50; from \$37.50 to \$25.00; and from \$60.00 to \$37.50 per month, respectively.

Said notice also advised said defendant she had a right to rebut such finding and to file objections to such proposed action within five days, and in the absence of such objections that an order would be entered decreasing such maximum rentals.

7. Before the expiration of said period of five days and before said order was issued by said director, said defendant filed a petition in the Superior Court of Bibb County, Georgia, the same being No. 7508 in the Civil Division of said Court, returnable to the October term thereof, alleging the material facts heretofore set out and further alleging that said Rent Director was acting without legal authority; that said Regulation and said Act are unconstitutional and void on stated grounds; that said defendant was without an adequate remedy at law in the premises; and sought an injunction restraining said Rent Director from the issuance of said order. Acting on said order, Hon. Malcolm D. Jones, Judge of the Superior Court of Bibb County, did on

July 14, 1943, issue an order restraining until further order of that Court, the said Rent Director from issuing any Regulation or other directive decreasing the rents then being charged by Mrs. Kate C. Willingham on the housing accommodations located at No. 20 Arlington Place, Macon, Georgia.

8. Defendant J. R. Hicks, Jr. is the only elected Sheriff of Bibb County, Georgia.

9. Said defendant Mrs. Kate C. Willingham has attempted and is attempting, to perform acts in violation of said Act and Regulation by attempting to demand and receive rentals for said housing accommodations in excess of the maximum amounts for said accommodations fixed and determined therefor by said Area Rent Director pursuant to lawful authority.

10. Said order and judgment of the Superior Court of Bibb County, Georgia, is utterly void for that said Court was without jurisdiction to entertain said described petition or to issue said order, said Court having been divested of such jurisdiction by the terms of the Emergency Price Control Act of 1942, and particularly Section 204 (d) thereof.

11. Plaintiff herein seeks to invoke the injunctive processes of this Honorable Court for the enforcement of a Federal law and for the effectuation of declared Federal policy in the control of rentals within designated Defense Rental Areas throughout the United States and the prevention of acts and practices which are inflationary in nature.

12. Plaintiff is without an adequate remedy at law and in his capacity as Price Administrator, an officer of the United States, unless this Court as a Court of equity intervenes in his behalf, will suffer irreparable injury and damage in the disruption and obstruction of the rent control program within the United States.

Wherefore, plaintiff demands

1. A preliminary and final injunction restraining and enjoining defendant Mrs. Kate C. Willingham, and all persons in active concert or participation with her, from further prosecution of said described proceedings in the Superior Court of Bibb County, Georgia, and from performing any further act and practices in violation of the Emergency Price Control Act of 1942 and Maximum Rent Regulation No. 26, and from attempting or agreeing to perform any acts in violation thereof; a preliminary and final injunction restraining and enjoining defendant J. R. Hicks, Jr., as Sheriff of Bibb County, Georgia, his agents, deputies and all persons in active concert or participation with him, from executing or attempting to execute by service or otherwise, the said described order or any subsequent orders entered in said described proceedings in the Superior Court of Bibb County, Georgia.

2. A temporary restraining order on the basis of this complaint and the affidavit attached hereto as "Exhibit A" restraining and enjoining defendants, and each of them, from engaging in any of the acts or practices for which a preliminary and final injunction is demanded.

Plaintiff now moves the Court for an order setting a time and place for a hearing upon plaintiff's demand for a preliminary injunction.

T. NELSON PARKER,

T. Nelson Parker,

Regional Attorney.

RALPH R. QUILLIAN,

Chief Attorney, Atlanta District Office,

L. P. WEBB.

Chief Enforcement Attorney, Atlanta District Office,

Office of Price Administration,

44 Pryor Street NE., Atlanta, Georgia.

GEORGE J. BURKE,

George J. Burke,

FLEMING JAMES,

of Counsel.

Office of Price Administration, Federal Office Building No. 1, Washington, D. C., Attorneys for Plaintiff.

In person before the undersigned, an officer authorized by law to administer oaths, appeared Ralph R. Quillian, who being duly sworn, deposes and says that he is Chief Attorney for the Office of Price Administration in the Atlanta District Office, and that

this affidavit is made for the purpose of being used as evidence for the plaintiff upon application for a temporary restraining order and any subsequent hearings seeking preliminary and final injunctions in the above entitled cause.

Further, that in the course of his official duties affiant has had occasion to examine the records of the Area Rent Director of the Macon Defense Rental Area and also a copy of the petition filed by Mrs. Kate C. Willingham in the Superior Court of Bibb County, Georgia, against said Area Rent Director, together with the order issued by said Court against said Rent Director.

Further, that the amount of maximum rents being demanded and received by said defendant Mrs. Kate C. Willingham for the accommodations described in the foregoing complaint, to wit: \$60.00, \$40.00, and \$37.50 respectively, are in excess of the maximum rents fixed and determined by said Area Rent Director for said respective accommodations, and that in continuing to demand said higher rentals said defendant Mrs. Kate C. Willingham is violating and attempting to violate the Emergency Price Control Act of 1942 and said Rent Regulations.

Further, affiant saith not.

RALPH R. QUILLIAN.

Sworn to and subscribed before me, this the 16th day of July 1943.

VIRGINIA B. BOROUGH,
Notary Public, Georgia, State at Large.

9 In District Court of the United States

[Title omitted.]

Summons and return.

To the above named Defendant:

You are hereby summoned and required to serve upon T. Nelson Parker, Ralph R. Quillian and L. P. Webb, plaintiff's attorneys, whose address is Office of Price Administration, 44 Pryor Street, N. E., Atlanta, Georgia, an answer to the complaint which is hereinwith served upon you, within Twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

GEORGE F. WHITE,

Clerk of Court.

By HELEN P. ERWIN,

Deputy Clerk.

[SEAL OF COURT]

Date: July 20th, 1943.

NOTE.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 20th day of July 1943, I received the within summons, petition and order, and on same date served same on James R. Hicks, Jr., by leaving a true and correct copy thereof with Oscar Harris, Deputy Sheriff, in the office of the Sheriff in Macon, Bibb County, Georgia, and I further certify that I served Mrs. Kate C. Willingham by handing to and leaving a true and correct copy thereof with Chas. J. Bloch, Atty., personally, as attorney for Mrs. Kate C. Willingham, at Macon, Bibb County, Georgia.

E. B. DOYLE,

United States Marshal.

By P. P. CONNELL.

Deputy United States Marshal.

NOTE.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

No. 238. District Court of the United States, Middle District of Georgia. Prentiss M. Brown, Administrator, Office of Price Administration v. Mrs. Kate C. Willingham and J. R. Hicks, Jr. Summons in Civil Action. Returnable not later than twenty days after service. T. Nelson Parker, Ralph R. Quillian, L. P. Webb, Atlanta, Georgia, Attorneys for Plaintiff.

10

In United States District Court

Rule Nisi

Filed July 20, 1943

A complaint demanding a temporary restraining order, preliminary and final injunctions having been presented,

It is ordered that the same together with this order be filed and copies thereof be served upon the defendants;

It is further ordered that defendants and each of them show cause before the United States District Judge presiding in the Federal Court Room, Federal Building, Macon, Georgia, or at such other place as the Court may then be sitting, on the 24 day of July 1943 at ten o'clock, A. M. why a preliminary injunction should not be granted.

Dated at Savannah, Georgia, this 17th day of July 1943, at 12 o'clock A. M.

ARCHIBALD B. LOVETT,
United States Judge.

In United States District Court

Amendment to original complaint

Filed Aug. 16, 1943

Now comes Prentiss M. Brown, Administrator, Office of Price Administration, plaintiff in the above entitled cause, and with leave of Court first had, amends his original complaint heretofore filed as follows:

1. Plaintiff amends Paragraph 2 of the original complaint by striking the same in its entirety and substituting in lieu thereof the following:

"Pursuant to Section 205 (a) of the Act and pursuant to his right as an officer of the United States authorized to sue, and charged with the execution of the policy of Congress declared in the Act, the Price Administrator brings this action to restrain violations and attempted violations of, and to enforce compliance with, said Act and said Regulation as amended and to effectuate the public policy of a statute of the United States."

2. Plaintiff amends Paragraph 3 of the original complaint by adding thereto the following:

"as provided in Title 28 U. S. C. A., Section 41 (1)."

Wherefore, plaintiff prays that this, his amendment, be allowed.

T. NELSON PARKER,

T. Nelson Parker,

Regional Attorney,

RALPH R. QUILLIAN,

Ralph R. Quillian,

Chief Attorney, Atlanta District Office,

L. P. WEBB,

L. P. Webb,

Chief Enforcement Attorney,

Atlanta District Office,

Office of Price Administration,

44 Pryor Street NE., Atlanta, Georgia.

GEORGE J. BURKE,

George J. Burke,

FLEMING JAMES,

Fleming James,

Of Counsel,

Office of Price Administration,

Federal Office Building No. 1,

Washington, D. C.

Attorneys for Plaintiff.

In United States District Court

Order allowing amendment to complaint

Filed Aug. 17, 1943

The within and foregoing amendment having been presented,
It is ordered that the same be, and it is, hereby allowed, subject
to objection and motion, this 17 day of August 1943.

BASCOM S. DEAVER,
United States District Judge.

In United States District Court

[Title omitted.]

Second amendment to original complaint and order allowing same

Filed Aug. 16, 1943

Now comes Prentiss M. Brown, Administrator, Office of Price Administration, complainant, and with leave of Court first had further amends his original complaint heretofore filed by adding thereto an agreed copy of the petition of Mrs. Kate C. Willingham to the Superior Court of Bibb County, Georgia, in the case of Mrs. Kate C. Willingham vs. Andrew J. Lyndon, Rent Director, No. 7508, Superior Court of Bibb County, Georgia, October Term, 1943, the temporary restraining order and rule to show cause entered by said Court in said case, all of which is hereto attached.

Wherefore, complainant prays that this, his amendment, be allowed.

HENRY B. TROUTMAN,
Henry B. Troutman,
Regional Attorney,

RALPH R. QUILLIAN,
Ralph R. Quillian,

Chief Attorney, Atlanta District Office,

L. P. WEBB;

Chief Enforcement, Attorney,

Atlanta District Office,

Office of Price Administration,

44 Pryor Street NE., Atlanta, Georgia.

GEORGE J. BURKE,
George J. Burke,

FLEMING JAMES,
Fleming James,

Of Counsel,

Office of Price Administration, Federal Office Building No. 1, Washington, D. C., Attorneys for Plaintiff.

Order

The above and foregoing amendment having been presented,
It is ordered that the same be, and it is hereby, allowed, this
August 16, 1943.

BASCOM S. DEAVER,
United States District Judge.

14 *Exhibit to second amendment to complaint*

GEORGIA, Bibb County:

To the Superior Court of Said County:

The petition of Mrs. Kate C. Willingham respectfully shows to the Court the following facts:

1. Andrew J. Lyndon is a resident of Bibb County, Georgia, and is herein named as a defendant in his capacity as Rent Director of the Macon, Georgia, Defense Rental Area, of the Office of Price Administration.

2. The defendant Andrew J. Lyndon was on or about July 1, 1942, appointed by Leon Henderson, then Price Administrator of the Office of Price Administration, Area Rent Director of the Macon, Georgia, Defense Rental Area of the Office of Price Administration and is now acting as such. Said appointment was made under the authority vested in the said Leon Henderson as such Administrator by the Emergency Price Control Act of 1942 (Public Law 421—77th Congress, Approved January 30, 1942). This Act will be hereinafter referred to as the Price Control Act.

3. Your petitioner in May, 1941, purchased that housing accommodation within the said Defense Rental Area known as No. 20 Arlington Place in the City of Macon, Bibb County, Georgia.

4. Immediately after purchasing said property, your petitioner expended a considerable sum of money in the improvement, alteration, and rebuilding of the said properties, spending therefor the sum of more than \$3,000.00, and between April 1, 1941, and July 1, 1942, changed the housing accommodation so as to result in an increase in the number of dwelling units in such housing accommodation, establishing therein three apartments; one of which will be hereinafter referred to as lower left; another, lower right; and the other, upper.

15 5. On January 30, 1942, the Congress of the United States enacted the aforesaid Price Control Act, Section 2 (B) of which is in words and figures as follows:

"Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for,

and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, includ-

ing increases or decreases in property taxes and other costs.

16. In designating defense-rental areas, in prescribing regu-

lations and orders establishing maximum rents for such accommo-
dations, and in selecting persons to administer such regu-
lations and orders, the Administrator shall, to such extent as he
determines to be practicable, consider any recommendations which
may be made by State and local officials concerned with housing
or rental conditions in any defense-rental area."

6. On or about April 28, 1942, Leon Henderson, then Administrator, issued a declaration setting forth the necessity for and recommendations with reference to the stabilization or reduction of rents for defense area housing accommodations within the Macon, Georgia, Defense Rental Area, comprising the Counties of Bibb, Houston, and Peach, of said State.

7. On June 30, 1942, rents for such accommodations within said defense area having not, in the judgment of the Administrator, been stabilized or reduced by State or local regulation or otherwise, in accordance with the recommendations, the Administrator, by Maximum Rent Regulation Number 26, established maximum rents for such accommodations.

8. Section 4 (A) of the said Regulation, which became effective July 1, 1942, provided for maximum rents for housing accom-

modations rented on April 1, 1941, should be the rent for such accommodations on that date.

9. The aforesaid housing accommodations were not rented on that date.

10. Section 4 (C) of the said Regulation provided as follows:

"For housing accommodations not rented on April 1, 1941, nor during the two months ending on that date, but rented prior to the effective date of this Maximum Rent Regulation, the first rent for such accommodations after April 1, 1941. The Administrator may order a decrease in the maximum rent as provided in Section 5 (c)."

11. Section 4 (D) of the Regulation provides as follows:

"For (1) newly constructed housing accommodations without priority rating first rented after April 1, 1941, and before the effective date of this Maximum Rent Regulation, or (2) housing accommodations changed between those dates so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations changed between those dates from unfurnished to fully furnished, or from fully furnished to unfurnished, or (4) housing accommodations substantially changed between those dates by a major capital improvement as distinguished from ordinary repair, replacement and maintenance, the first rent for such accommodations after such construction or change; Provided, however, That, where such first rent was fixed by a lease which was in force at the time of a major capital improvement, the maximum rent shall be the first rent after termination of such lease. The Administrator may order a decrease in the maximum rent as provided in Section 5 (c)."

12. Section 5 (C) of the Regulation provides as follows:

"The Administrator, at any time on his own initiative, or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

(1) The maximum rent for housing accommodations under paragraphs (C), (D), or (G) of Section 4 is higher than the rent generally prevailing in the defense rental area for comparable housing accommodations on April 1, 1941. * * *

13. After the housing accommodations had been so changed, your petitioner first rented the upper apartment on July 24, 1941, for a monthly rental of \$40.00, so that under the Regulation, the maximum rent for this apartment was \$40.00 per month. On September 1, 1942, the present tenant thereof, C. C. Avera, rented this apartment at a monthly rental of \$37.50.

14. After the housing accommodations had been so changed, your petitioner first rented the lower left apartment on June 24, 1941, to J. C. Barlow, at a monthly rental of \$37.50 per month, so that the maximum rental for this apartment under the Regulation was \$37.50 per month. The present tenant is Mrs. Lucy Asbill, who became such tenant on June 1, 1942, at the rental of \$37.50 per month.

15. After the housing accommodations had been so changed, your petitioner furnished the lower right apartment, and the apartment was first rented to Lieutenant L. A. Young so furnished on July 9, 1941, at a monthly rental of \$60.00 per month. The present tenant of the said furnished lower right apartment is Carlyle Earnest, who occupied it as such tenant on February 1, 1943, at a monthly rental of \$55.00 per month.

16. On June 14, 1943, the said Rent Director gave to your petitioner a so-called "notice to landlord of proceedings on Rent Director's initiative" concerning the upper apartment of these housing accommodations and stated therein "The preliminary investigation by the Rent Director indicates that the maximum rent for the above housing accommodations should be decreased because: the above housing accommodations were not rented on April 1, 1941, and the first rent received, and as registered by the landlord, is in excess of that generally prevailing in this defense rental area on April 1, 1941, for comparable accommodations. Therefore, the Rent Director proposes to decrease the maximum rent from \$40.00 per month to \$27.50 per month, acting pursuant to Section 5 (C) of the Maximum Rent Regulation. In the event you wish to file objections to this proposed action, such objections must be filed within five days from the date of this notice, together with written evidence supporting your objections.

19. 19. The written evidence submitted in support thereof should be typed or legibly written, and the numbers of the housing accommodations and the docket number appearing on this notice should be placed at the top of the first page of the objections. If no objections and supporting evidence are filed within the above period, the Rent Director may enter an order decreasing the maximum rent."

17. A similar notice was on the same date given by the Rent Director with respect to the lower left apartment, except that it recited "The above housing accommodations were not rented on April 1, 1941, but were first rented on July 1, 1941, and the first rent received, and as registered by the landlord, is in excess of that generally prevailing in this defense rental area on April 1, 1941."

In that notice, the Rent Director proposes to decrease the maximum rent from \$37.50 per month to \$25.00 per month.

18. On June 15, 1943, a similar notice was given with respect to the lower right apartment, except that this notice contained the following language: "The above housing accommodation was not rented on April 1, 1941, but was first rented on July 1, 1941, and the first rent received; and as registered by the landlord, is in excess of that generally prevailing in this defense rental area on April 1, 1941, for comparable accommodations." And in that notice the rent director proposes to decrease the maximum rent from \$60.00 per month to \$37.50 per month.

19. Your petitioner duly furnished evidence justifying the rents being charged, but on July 5, 1943, the said Rent Director wrote your petitioner's attorneys that upon further consideration he saw no reason to change what was set forth in the notices described in the three preceding paragraphs, and that he would proceed to issue an order decreasing the rents as soon as practicable.

20. Your petitioner is advised and so charges that the orders contemplated by the Director so reducing the rents for your petitioner's properties have not been issued.

20 21. Your petitioner has no complete and adequate remedy in a Court of Law after the Rent Director proceeds to issue these orders. Your petitioner must comply with them at the risk of subjecting herself to heavy civil and criminal penalties under the provisions of the aforesaid Price Control Act.

22. Your petitioner charges that the Rent Director is without legal authority to interfere with her contractual relationships with her tenants and without legal authority to issue the orders which he contemplates issuing; but if he does so issue them, she will be forced to comply with them or else subject herself to the possibility of tremendous civil and criminal penalties under the aforesaid Price Control Act.

23. Your petitioner avers that Section 5 (C) (1) of Maximum Rent Regulation Number 26 hereinbefore set out in paragraph 12 of this bill is unconstitutional and void, for that:

(1) It would deprive your petitioner of her property without due process of law in violation of the Fifth Amendment to the Constitution of the United States;

(2) It seeks to delegate to the Administrator and his agents, legislative powers in violation of Article I, Section 1 of the Constitution of the United States;

(3) It seeks to delegate to the Administrator or his agent, the Macon Director, judicial powers in violation of Article —, Section — of the Constitution of the United States;

(4) The said portion of the Regulation is too vague and indefinite to be capable of enforcement according to the law of the land having in it no criterion or rules by which the Administrator

and his agents are to be guided in orders decreasing maximum rent otherwise allowable; the phrase "the rent generally prevailing in the defense rental area for comparable housing accommodations on April 1, 1941" being vague, indefinite, and meaningless in the eyes of the law.

24. The aforesaid Maximum Rent Regulation, in Section 13 (2) thereof, provides:

21 "The term 'Administrator' means the Price Administrator of the Office of Price Administration, or the Rent Director, or such other person or persons as the Administrator may appoint or designate to carry out any of the duties delegated to him by the Act."

25. So it is, therefore, that in the case of a house first rented in this defense rental area after April 1, 1941, after having been substantially changed, the Congress of the United States has sought to delegate to the Administrator the power at any time, on his own initiative, or on application of the tenant, to order a decrease of the maximum rent otherwise allowable, on the ground that the maximum rent for housing accommodations prescribed in the Regulation for housing accommodations in a situation such as these were, is higher than the rent generally prevailing in the defense rental area for comparable housing accommodations on April 1, 1941, and the Administrator, in turn, has sought by the issuance of the Regulation to delegate this power to defendant, the Rent Director.

26. Your petitioner avers that the order, if issued by the Rent Director, would deprive her of her property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

27. Your petitioner avers that if the contemplated orders were issued, such issuance would constitute the exercise by the Rent Director of powers delegated to him in violation of Article I, Section 1 of the Constitution of the United States and in violation of Article —, Section — of the Constitution of the United States.

28. Your petitioner avers that Section 2 (B) of the Price Control Act hereinabove cited and set out in full in paragraph 5 hereof, is unconstitutional and void, for that:

- (a) The Congress has purported to bestow on the Administrator legislative power which it cannot delegate;
- (b) The Act purports to give the Administrator the right to establish such maximum rent for housing accommodations as in his judgment will be generally fair and equitable, and will effectuate the purposes of the Act, and the Act establishes no criterion to govern the exercising of the discretion vested in the Administrator;

(c) The Act does not require any finding by the Administrator of the facts upon which his determination of the maximum rent for the plaintiff's property is based;

(d) The Administrator is not required by the Act to fix the maximum rent schedule on a basis which will provide a fair and reasonable return to property owners generally, or to your petitioner under the circumstances stated herein;

(e) The Act allows the Administrator, in fixing the maximum rent for the plaintiff's property, to reject, in his discretion, any standard or criterion mentioned by the Congress in the Act.

29. In these respects the Act is violative of Sections 1 and 8 of Article I of the Constitution of the United States.

30. Your petitioner asserts that the aforesaid Emergency Price Control Act and the aforesaid Maximum Rent Regulation Number 26 are repugnant to Sections 1 and 2 of Article III of the Constitution of the United States in the following respects:

(a) The Act seeks to vest in the Administrator power vested by the Constitution of the United States in the Judiciary;

(b) The Act fails to provide for the judicial ascertainment of the maximum rent to which the plaintiff is entitled;

(c) The Act fails to provide for the judicial ascertainment of the reasonable rent for the plaintiff's property;

(d) The Act constitutes an attempt by the Congress to usurp the powers of the Judiciary;

(e) The Act seeks to authorize the Administrator to determine the area within which he shall be allowed to fix the maximum rent, and the Congress has fixed no sufficient standard or criterion for the authority so vested in the Administrator.

31. The proposed orders would further be unconstitutional and void in that in issuing them the Rent Director would be making no attempt to fix a rent for your petitioner's property which is fair and reasonable.

Wherefore, your petitioner prays:

1. That process may issue, requiring the defendant in his capacity as Rent Director to be and appear at the next term of this Court, to answer this complaint;

2. That said defendant as Rent Director and the Rent Director of the Macon, Georgia, Defense Rental Area be restrained and enjoined from issuing any order reducing the rents on the housing accommodations described herein, which rents are now being paid and received by your complainant;

3. That the defendant as Rent Director and the Rent Director of the Macon, Georgia, Defense Rental Area be restrained and enjoined from reducing the rent on the lower left apartment from \$37.50 per month to \$25.00 per month; and the upper apart-

ment from \$40.00 per month to \$27.50 per month; and the lower right apartment from \$60.00 per month to \$37.50 per month;

4. And for such other and further relief as to the Court may seem meet and proper.

HALL & BLOCH,
Petitioner's Attorneys.

GEORGIA, Bibb County:

You, A. R. Willingham, being duly sworn, depose and say that the complainant, Mrs. Kate C. Willingham, is your wife, that you are her agent, and that the averments of fact in the foregoing petition are true.

A. R. WILLINGHAM.

Sworn to and subscribed before me, this 13 day of July 1943,

M. S. THOMAS,

Notary Public, Bibb County, Georgia.

24

Order

The foregoing petition has been presented, considered, sanctioned, and ordered filed.

It is ordered that Andrew J. Lyndon as Rent Director of the Macon, Georgia, Defense Rental Area, and the Rent Director of the Macon, Georgia, Defense Rental Area, be restrained until further order of this Court from issuing any regulation, order, or directive, decreasing the rents now being charged by Mrs. Kate C. Willingham on the housing accommodations described in the bill.

It is further ordered that the Rent Director of the Macon, Georgia, Defense Rental Area show cause before me at the Court-house in Macon, Georgia, at 10 o'clock, A. M., on the 6th day of September 1943, why he should not be enjoined as prayed.

In open Court, this 14th day of July 1943.

MALCOLM D. JONES,
Judge, Superior Courts, Macon Circuit.

95

In United States District Court

Answer and motion to dismiss of Mrs. Kate C. Willingham

Filed Aug. 4, 1943

Comes now the defendant, Mrs. Kate C. Willingham, and files this her defense in the case stated, and for grounds thereof says:

1. The bill fails to state a cause of action against defendant upon which relief can be granted.

2. An injunction should not be granted in this cause for the reason that such grant would be violative of Section 265 of the Judicial Code (United States Code, Annotated, Title 28, Section 378).

3. Even if the Court has jurisdiction to grant an injunction in this cause, it should not for the reason that the defendant has not engaged in acts and practices which constitute violations and/or attempted violations of the Emergency Price Control Act of 1942, but has simply asserted her rights as a citizen in the State Courts of Georgia to test the validity of the Emergency Price Control Act of 1942.

4. Further responding and answering the complaint, this defendant denies Paragraph 1 thereof, and unqualifiedly asserts that she has not engaged in acts and practices which constitute violations and attempted violations of the Emergency Price Control Act of 1942, nor has she engaged in acts and practices which constitute violations and/or attempted violations of Maximum Rent Regulation Number 26.

5. Answering paragraph 2 thereof, this defendant says that Section 205 (A) of the Emergency Price Control Act does not confer jurisdiction of this cause upon this Honorable Court for the reason that this defendant has not engaged in nor is she about to engage in any acts or practices which constitute or will constitute a violation of any provision of Section 4 of the Act.

She has not demanded or received any rent for housing accommodations, or otherwise done or omitted to do any act in
26 violation of any regulation or order promulgated under Section 2 of the Act.

She is seeking in the State Courts of Georgia to restrain the issuance of an order which, if issued, will deprive her of her constitutional and legal rights. She is simply seeking to test, in the Courts of the nation, the validity of an Act of Congress.

6. This defendant denies that jurisdiction of this action is conferred upon the Court by Section 205 of the Act, and denies that jurisdiction is conferred upon the Court by any general law or general principle of equity.

7. The allegations contained in paragraph 4 of the bill are admitted.

8. The allegations of paragraph 5 of the bill are admitted.

9. The allegations of fact in paragraph 6 of the bill are admitted.

However, this defendant denies that the Rent Director had any legal right to decrease the rents for the housing accommodations described in said paragraph 6. The said Rent Director is claiming that right under the provisions of Section 5 (C) (1)

of Maximum Rent Regulation Number 26. This defendant has asserted in the State Court that Section 5 (C) (1) of Maximum Rent Regulation Number 26, which provides:

"The Administrator, at any time on his own initiative or on application of a tenant, may order a decrease of the maximum rent otherwise allowable only on the grounds that: 1: the maximum rent for housing accommodations in Paragraphs C, D, or G, of Section 4, is higher than the rent generally prevailing in the defense rental area for comparable housing accommodations on April 1, 1941 . . . *

is unconstitutional and void for that: (a) : it would deprive this defendant of her property without due process of law in violation of the Fifth Amendment to the Constitution of the United States; (b) : it seeks to delegate to the Administrator and his agents legislative powers in violation of Article I, Section 1 of the Constitution of the United States; (c) : it seeks to delegate to the Administrator or his agent, the Macon Director, judicial powers in violation of Article III, Section 1 of the Constitution of the United States; (d) ; the said portion of the Regulation is too vague and indefinite to be capable of enforcement according to the law of the land, having in it no criterion or rules by which the Administrator and his agents are to be guided in orders decreasing maximum rent otherwise allowable; the phrase "the rent generally prevailing in the defense rental area for comparable housing accommodations on April 1, 1941" being vague, indefinite, and meaningless in the eyes of the law.

This defendant asserts in this Court that the aforesaid provisions of the aforesaid Regulation are for the same reasons unconstitutional and void as stated in this paragraph.

10. The allegations of paragraph 7 of the bill are substantially correct, except that the petition described therein was not filed before the expiration of said period of five days.

11. Paragraph 8 of the bill is admitted.

12. Paragraph 9 of the bill is expressly denied. The Area Rent Director has not fixed and determined rents for the housing accommodations described in the bill pursuant to lawful authority. He simply proposed to fix rents therefor. Whereupon your petitioner filed in the Superior Court of Bibb County, Georgia, her bill seeking to enjoin him from so doing, for the reasons stated in the bill which will be presented to the Court.

13. Paragraph 10 of the bill is expressly denied. This defendant asserts that the Superior Court of Bibb County, Georgia, has jurisdiction to entertain the described petition and to issue an order thereon. The question of whether or not the Superior Court

28 of Bibb County, Georgia, has jurisdiction to entertain the said suit is for determination by the Superior Court of Bibb County, Georgia. Section 204 (D) of the Emergency Price Control Act of 1942 does, in its terms, seek to divest the Superior Court of Bibb County, Georgia, and this Court and all other Courts except the Emergency Court of Appeals and the Supreme Court of the United States of jurisdiction to determine the constitutionality of any regulation or order issued under the terms of the Emergency Price Control Act, or to stay, restrain, enjoin, or set aside in whole or in part any provision of the said Act. This defendant asserts that the Congress of the United States has no constitutional power to enact any such legislation, and that therefore the aforesaid portion of Section 204 (D) of the Emergency Price Control Act of 1942 is unconstitutional and void.

Article VI, Paragraph 2, of the Constitution of the United States, provides that the Constitution of the United States and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land. The Constitution of the United States is therefore the Supreme law of the land and if a law of the United States is not enacted pursuant to the Constitution, such law is void, and it is the right and duty of any Court so to declare it. This is an inherent power for all Courts. The Congress of the United States did not grant to the Courts of the States nor to this Court the right and duty of declaring law to be contrary to the Constitution, and it cannot deprive the Courts of the States and this Court of that right and that duty. That right and that duty are conferred by the Constitution of the United States, and only the Constitution can deprive the Courts of that right and that duty. The Congress of the United States cannot.

14. Your defendant is advised that Paragraph 11 of the bill contains no allegation of fact that she is required to answer.

15. Paragraph 12 of the bill is denied. All matters which are set up in this bill can be set up in answer to the bill previously filed by this defendant in the Superior Court of Bibb County, Georgia.

Wherefore, this defendant respectfully prays:

29 (A) That the bill be dismissed;

(B) That it be held by this Honorable Court that it has no jurisdiction to enjoin the proceeding in the State Court;

(C) That even if this Court should decide that it has jurisdiction to enjoin the proceeding in the State Court, that this Court do not grant such injunction;

(D) That if this Court should decide to take jurisdiction of this cause, that it decree that the portions of Section 204 (D) of the Emergency Control Act hereinbefore referred to be declared unconstitutional and void and beyond the powers of Congress, and that this Court decree that the complainant and his officers and agents, particularly the Rent Director of the Macon, Georgia, Defense Rental Area, be restrained and enjoined from issuing any orders seeking to reduce the rents described in the bill and described in the bill in the Superior Court of Bibb County, Georgia, for the reasons set out in that bill.

HALL & BLOCH,
Attorneys for Defendant.

Of Counsel,

CHARLES J. BLOCH.

80 [Duly sworn to by *A. R. Willingham*; jurat omitted in printing.]

81 In United States District Court

Answer and motion to dismiss of J. R. Hicks, Jr.

Filed Aug. 4, 1943

Comes now J. R. Hicks, Jr., one of the defendants in the case stated, and in response and answer thereto, says:

1. For want of sufficient information he can neither admit nor deny the allegations of Paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, and 12 of the bill.

2. He admits the allegations of Paragraph 8 of the bill.

3. This defendant avers that no injunction should be issued, restraining and enjoining him or his Deputies from executing or attempting to execute, by service or otherwise, any order which may be entered or promulgated by the Judge of the Superior Court of Bibb County, Georgia.

4. The bill fails to state a cause of action against this defendant upon which relief can be granted.

Wherefore, this defendant prays that the bill be dismissed, and that no injunction be granted as to him.

HALL & BLOCH,
Attorneys for Defendant *J. R. Hicks, Jr.*

Of Counsel,

ELLSWORTH HALL, Jr.

Amendment to the defensive pleading of Mrs. Kate C. Willingham

Filed Aug. 30, 1943

Comes now Mrs. Kate C. Willingham, one of the defendants in the case stated, and amends her defensive pleading in the case stated as follows:

1. The complainant has amended his original complaint and invoked the jurisdiction of this Court as a Court of Equity. Its jurisdiction, therefore, extends to the determination of all questions involved in the case.

The Emergency Price Control Act of 1942, referred to in paragraph No. 1 of the complaint, contains Section 2 (B), which is in words and figures as follows:

"Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendation, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April

1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regu-

lations and orders, the Administrator shall to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area."

2. This defendant avers that Section 2 (B) of the Emergency Price Control Act hereinabove cited and set out in full in the preceding paragraph is unconstitutional and void, for that:

(a) The Congress has purported to bestow on the Administrator legislative power which it cannot delegate;

(b) The Act purports to give the Administrator the right to establish such maximum rent for housing accommodations as in his judgment will be generally fair and equitable, and will effectuate the purposes of the Act, and the Act establishes no criterion to govern the exercising of the discretion vested in the Administrator;

(c) The Act does not require any finding by the Administrator of the facts upon which his determination of the maximum rent for the defendant's property is based;

(d) The Administrator is not required by the Act to fix the maximum rent schedule on a basis which will provide a fair and reasonable return to property owners generally, or to this defendant;

34 (e) The Act allows the Administrator, in fixing a maximum rent, to reject in his discretion any standard or criterion mentioned by the Congress in the Act.

In this respect the Act is violative of Sections 1 and 8 of Article I of the Constitution of the United States.

3. This defendant shows that one of the provisions of Maximum Rent Regulation Number 26, referred to in paragraph 1 of the complaint, is Section 4 (C), which is as follows:

For housing accommodations not rented on April 1, 1941 nor during the two months ending on that date, but rented prior to the effective date of this Maximum Rent Régulation, the first rent for such accommodations after April 1, 1941. The Administrator may order a decrease in the maximum rent as provided in Section 5 (C)."

4. Another provision of the aforesaid Regulation is Section 4 (D), which is as follows:

"For (1) newly constructed housing accommodations without priority rating first rented after April 1, 1941 and before the effective date of this Maximum Rent Regulation, or (2) housing accommodations changed between those dates so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations changed between those dates from unfurnished to fully furnished, or from fully furnished to unfurnished,

or (4) housing accommodations substantially changed between those dates by a major capital improvement as distinguished from ordinary repair, replacement and maintenance; the first rent for such accommodations after such construction or change; Provided, however, That, where such first rent was fixed by a lease which was in force at the time of a major capital improvement, the maximum rent shall be the first rent after termination of such lease. The Administrator may order a decrease in the maximum rent as provided in Section 5 (c)."

5. Another provision of the aforesaid Regulation is Section 5 (C) (1), which is as follows:

"The Administrator, at any time on his own initiative, or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that :

"(1) The maximum rent for housing accommodations under paragraphs (C), (D), or (G) of Section 4 is higher than the rent generally prevailing in the defense rental area for comparable housing accommodations on April 1, 1941 * * *."

This defendant avers that Section 5 (C) (1) of Maximum Rent Regulation Number 26 hereinfore set out is unconstitutional and void, for that :

(1) It would deprive this defendant of her property without due process of law in violation of the Fifth Amendment to the Constitution of the United States ;

(2) It seeks to delegate to the Administrator and his agents legislative powers in violation of Article I, Section 1, of the Constitution of the United States;

(3) It seeks to delegate to the Administrator or his agents judicial powers in violation of Article III, Section 1, of the Constitution of the United States;

(4) The said portion of the Regulation is too vague and indefinite to be capable of enforcement according to the law of the land, having in it no criterion or rules by which the Administrator and his agents are to be guided in orders decreasing maximum rent otherwise allowable; the phrase "the rent generally prevailing in the defense-rental area for comparable housing accommodations on April 1, 1941" being too vague, indefinite, and meaningless to form the basis for the exercise of any legal action by the Administrator;

36 (5) The said portion of the Regulation is not in accordance with the law.

6. This defendant invoked the jurisdiction of the Superior Court of Bibb County, Georgia, charging that the Rent Director was without legal authority to interfere with her contractual relationships with her tenants.

7. Under the provisions of Article VI, Section 1, of the Constitution of the United States, that Constitution and the laws of the United States made in pursuance thereof are the supreme law of the land, and the Judges in every State shall be bound thereby.

8. Under the provisions of Article VI, Section 3, of the Constitution of the United States, all the executive and judicial officers both of the United States and of the several States shall be bound by oath or affirmation to support the Constitution of the United States.

9. Under the provisions of Article VI, Paragraph 2, of the Constitution of the United States, the Congress of the United States has no authority to enact any law which would deprive the Courts of the States of the right and duty to declare a law unconstitutional, and has no constitutional right in this respect, to limit the jurisdiction of the Court of a State.

10. The Congress of the United States in passing the Emergency Price Control Act did not seek to divest the State Courts of all jurisdiction as to causes of action arising under that Act; on the contrary, by the provisions of Sections 205 (A), 205 (C), and 205 (E) thereof conferred jurisdiction upon the State Courts in actions for injunction brought by the Administrator and in actions for penalties brought by a tenant or the Administrator.

11. In Section 204 (D) of the Emergency Price Control Act is the following language:

37 "Except as provided in this section, no Court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation or order or price schedule, or to stay, restrain, enjoin, or set aside in whole or in part any provision of this Act authorizing the issuance of such regulations or orders or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

The defendant asserts the foregoing quoted portion of Section 204 (D) of the Emergency Price Control Act as applied to a State Court, is unconstitutional and void as being in violation of the supremacy clause of the Constitution of the United States contained in Article VI, Paragraph 2, thereof.

If a law of the United States shall not be made pursuant to the Constitution of the United States, it is the right and duty of the Court so to declare, and the Congress of the United States has no power to deprive the Court of that right.

12. The complainant in this case, by invoking the jurisdiction of this Court, has waived the aforesaid provisions of Section 204 (D) of the Emergency Price Control Act.

13. This defendant avers that Section 2 (B) of the Emergency Price Control Act of 1942, set out in full in paragraph one of this

amendment, is unconstitutional and void and cannot serve as a basis for any relief to the complainant for the reasons assigned in paragraph 2 of this amendment.

14. Defendant asserts that the Maximum Rent Regulation Number 26, and particularly paragraphs 4(C), 4 (D), and 5 (C) (1) thereof, are unconstitutional and void for the reason set out in paragraph 5 of this amendment, and cannot serve as a basis for any relief to the complainant.

38 15. Complainant avers that if the Rent Director were to issue the proposed order, detailed in the original defensive pleadings of this defendant, such order would be unconstitutional and void for that the Congress of the United States has not delegated to the "Rent Director" the power which he seeks to exercise and the act of the Price Administrator in seeking to delegate that power to the Rent Director is unconstitutional and void for that:

(a) The Administrator seeks to delegate to the Rent Director powers which he was not authorized to delegate under the Emergency Price Control Act;

(b) Such order would deprive this defendant of her property without due process of law in violation of the Fifth Amendment to the Constitution of the United States;

(c) The issuance of such order would be the exercise of legislative powers in violation of Article I, Section I, of the Constitution of the United States;

(d) The issuance of such order would be the exercise of judicial power in violation of Article III, Section 1, of the Constitution of the United States.

Wherefore, this defendant prays:

(1) That this amendment be allowed;

(2) That the bill as amended be dismissed;

(3) That it be held by this Honorable Court that it has no jurisdiction to enjoin a proceeding in the State Court;

(4) That even if this Court should decide that it has jurisdiction to enjoin the proceeding in the State Court, that this Court do not grant such injunction, but allow the case to proceed in the State Court;

(5) That this Court decree that Section 2 (B) of the Emergency Price Control Act is unconstitutional and void and beyond the powers of the Congress; that Maximum Rent Regulation Number 26 and particularly Section 5 (C) (1) thereof are unconstitutional and void, and beyond the powers of the Congress;

39 that the portions of Section 204 (D) of the Emergency Price Control Act set out in paragraph 11 of this amendment are unconstitutional and void, particularly as applied to a State Court and as applied to this Court under the circumstances

of this case and that therefore the complainant can obtain no relief based upon this Act and Regulation.

HALL & BLOCH,
Attorneys for Defendant.
CHARLES J. BLOCH,
Of Counsel.

Amendment allowed in Open Court, this August 30, 1943.

BASCOM S. DEAVER,
U. S. Judge.

40

In the District Court of the United States

Order sustaining motion to dismiss

September 1, 1943

This case having been heard on Defendants' motion to dismiss the action, after argument of counsel thereon,

It is ordered that said motion to dismiss be sustained on the ground that the rent provisions of the Emergency Price Control Act of 1942 and the regulations promulgated pursuant thereto are unconstitutional and invalid, for the reasons stated in the opinion of this court in the case of John W. Payne v. J. H. Griffin, No. 89, Thomasville Division, Middle District of Georgia, a copy of which is filed as the opinion in this case and made a part of the record in this case.

The action is hereby dismissed.

This the 1st day of September 1943.

BASCOM S. DEAVER,
United States District Judge.

41 In the District Court of the United States for the
Middle District of Georgia, Thomasville Division

Civil Action No. 89

JOHN W. PAYNE, PLAINTIFF

v.

J. H. GRIFFIN, DEFENDANT

Opinion

August 30, 1943

DEAVER, District Judge:

This suit was brought by a tenant against a landlord under Section 205 (e) of the Emergency Price Control Act of 1942 to

recover a money judgment for an alleged violation of a regulation as therein provided. Defendant moved to dismiss on the ground that the act and the regulation creating the right of action are unconstitutional and void. The plaintiff contends that this court has no jurisdiction to pass upon the constitutionality of either the act or the regulation. The Administrator came into the case by intervention. He admits jurisdiction to determine the constitutionality of the act but denies jurisdiction to question the validity of the regulation.

I

JURISDICTION

The act confers jurisdiction to try this case but in Section 204 (d) says that

The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, 42 or to stay, restrain, enjoin, or set aside in whole or in part, any provisions of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

By Article 3, Section 1, of the constitution, the judicial power of the United States is vested in a Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

A district court can entertain only such cases as Congress gives it jurisdiction to try. Jurisdiction to try any case or class of cases may be withheld altogether. But once congress confers jurisdiction to try a case it cannot withhold power to decide the case according to the applicable law. The contention of the plaintiff is contrary to the decisions of the Supreme Court from *Marbury v. Madison*, 5 U. S. 137, down through the years to the present time.

If congress prohibits an inferior court from trying a case, the court cannot entertain it and, if congress confers jurisdiction to try a case, the court cannot refuse to accept jurisdiction. It is bound to hear and decide the case. But, having directed the court to try the case, congress has no authority also to direct the court to

render judgment in accordance with the terms of a void act in disregard of the supreme law of the land. The distinction is that, while congress can determine what cases a court can try, it cannot direct what law shall control the decision.

In *Adkins v. Children's Hospital*, 261 U. S. 525, 544 is the following language:

"The Constitution, by its own terms, is the supreme law of the land, emanating from the people, the repository of ultimate sovereignty under our form of government. A congressional statute, on the other hand, is the act of an agency of this sovereign authority and if it conflict with the Constitution must fall; for that which is not supreme must yield to that which is. To hold it invalid (if it be invalid) is a plain exercise of the judicial power—that power vested in courts to enable them to administer justice according to law. From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty

to declare and enforce the rule of the supreme law and reject
43 that of an inferior act of legislation which, transcending
the Constitution, is of no effect and binding on no one.

This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law."

In *Smyth v. Ames*, 169 U. S. 466, 527, the court said:

"The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation."

See *Muskrat v. United States*, 219 U. S. 346, 359; 2 Story on the Constitution, p. 451, citing *Osborn v. Bank*, 9 Wheat, 819.

Again, the Supreme Court, in *United States v. Butler*, 297 U. S. 1, 62, said:

"There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land, ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in

the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."

The Supreme Court, in *Carter v. Carter Coal Company*, 298 U. S. 238, 296, again spoke, as follows:

"The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And

44 a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior statute whenever the two conflict. In the discharge of that duty, the opinion of the law-makers that a statute passed by them is valid must be given great weight, *Adkins v. Children's Hospital*, 261 U. S. 525, 544; but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry. *Schechter v. United States*, 295 U. S. 495, 549-550."

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not." *Chicago, etc., Railway Co. v. Wellman*, 143 U. S. 339, 345.

An unconstitutional law is no law and no court is bound to enforce it. 11 Am. Jur. p. 827, Sec. 148.

If a court has jurisdiction to try a case, it has inherent power to determine whether an act on which the existence of the right of action depends, conforms to the Constitution. See 11 Am. Jur. p. 709, Secs. 86, 88, and cases cited in support of the text.

Decisions might be multiplied almost without number but those cited are sufficient to show that the power of Congress to limit the jurisdiction of inferior courts refers to the character of cases

and does not include power to limit the law to be applied in the trial of cases which the court has jurisdiction to hear. See *In Re American States Public Service Co.*, 12 F. Supp. 667, 690.

A contrary conclusion would enable congress to require courts to enforce any act though clearly void. "Congress have not power to give original jurisdiction to the Supreme Court in cases other than those described in the constitution." *Marbury v. Madison*, 5 U. S. 137 (2).

If Congress can withhold power to determine the validity of an act from one inferior court, it could withhold such power from all inferior courts. It would follow that Congress could require an inferior court to render judgment in a case depending entirely on a void statute and prevent its validity from being passed upon by any inferior court. In a case, therefore, of which the Supreme Court has no original jurisdiction, the validity of the act could never be questioned in any court.

It is apparently well settled that, while Congress can prohibit an inferior court from trying a case at all, it can not authorize such a court to try a case and at the same time prevent the court from trying it according to the supreme law of the land. "Determination of a constitutional question is necessary and proper whenever it is essential to the decision of the case, as where the right of a party is founded solely on a statute, the validity of which is attacked." 16 C. J. S. p. 214.

The contention of the Administrator stands no better. In this case plaintiff is asking a judgment for money against the defendant. If a right to such judgment exists at all, it exists solely by reason of the statute and the regulation made pursuant to the statute. If the statute is valid and the regulation is valid, they together create a cause of action for violation of the regulation. If the statute is not valid, the regulation is nothing and no cause of action exists. Jurisdiction to try the case is jurisdiction to determine whether plaintiff by law is entitled to recover. To decide that question the court is bound to ascertain what law governs. If the regulation is valid, it has the force of law but it is no law apart from the statute itself. The statute and the regulation are interdependent in creating the cause of action and there is no cause of action unless both are valid. Whether either is valid depends upon its conformity to the supreme law of the land. If by that law the statute is void, the regulation falls and there is no law authorizing judgment in favor of plaintiff.

The very question, therefore, which Congress forces this court to determine, by conferring jurisdiction to try the case, namely, the question of whether plaintiff by law is entitled to recover, depends upon the validity of the statute which creates

the cause of action. The authorities applicable to the contention of the plaintiff are equally applicable to the contention of the Administrator.

When Congress withdraws from a court equity jurisdiction to enjoin the enforcement of a regulation, it does not call upon the court to act, but indeed, prohibits it from entertaining the suit at all. But when Congress directs a court to enforce a regulation by rendering a money judgment, the court is bound to decide whether such judgment is authorized by law, and a regulation made in pursuance of a statute in conflict with the constitution is not law. See *Lockerty v. Phillips*, 63 S. Ct. 1019, 1023. See also *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (13) holding that:

"Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

II

CONSTITUTIONALITY

The attack here made relates, not to the entire act, but only to the rent provisions. The war powers of Congress are not questioned. The power of Congress to enact a statute controlling rents in time of war is not denied. One of the contentions is that Congress has not passed a statute regulating rents, to be administered by an administrator, but has undertaken to authorize the administrator so to legislate.

To urge that Article 1, Section 8, of the Constitution settles the matter is to miss the question. That Article grants powers but it does not authorize Congress to delegate those powers.

47. Congress has power to enact a law to become effective when certain conditions come into existence and may delegate to an administrative officer the authority to determine, in accordance with the standard laid down by Congress, when the conditions have come into existence. Or, Congress may declare a policy and fix a definite standard by which the administrator is to be controlled and authorize him to make subordinate rules for the administration of the act. However, Congress cannot permit the administrator to determine what the law shall be.

In the present statute Congress declares that, for reasons set out, it is good policy to stabilize prices including rents. It then provides for an administrator and authorizes him to "issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act." The

administrator is authorized, but not required, to make such investigation as he deems necessary or proper to assist him in making and enforcing regulations, and may take official notice of economic data and other facts. As to rent, the act defines a defense-rental area as the District of Columbia and any area designated by the administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act. Under Section 2 (b), the administrator may, by regulation, fix such maximum rents as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. So far as practicable, the administrator is to ascertain and give due consideration to rents prevailing about April 1, 1941. The Act provides for protest within 60 days and after that the regulation is conclusive and no protest can be made except on new grounds arising after the 60-day period.

In 11 Am. Jur. p. 957, Sec. 240, it is said that:

"Thus, the authority attempted to be delegated to the President by Congress under the National Industrial Recovery Act, limiting his powers in no way and extending his discretion 48 to all the varieties of laws which he might deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country, thereby allowing him to impose within his discretion his own conditions to effectuate a so-called 'policy,' which was merely a statement of opinion, was such a sweeping delegation of powers properly exercisable only by the legislature itself as to fall beyond the pale of constitutional limits. There can be no grant to the executive of any roving commission to inquire into evils and, upon discovering them, to do anything he pleases to correct them."

As to delegation of legislative power, the Supreme Court, in *Field & Co. v. Clark*, 143 U. S. 649, 694, quoted the following language:

"The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."

In *Wichita R. R. v. Pub. Utilities Comm.*, 260 U. S. 48, the court was dealing with the power of an administrative body to fix rates. The act there required the Commission, after hearing and investigation, to find existing rates to be unreasonable before reducing them but there was no requirement that the order should contain the finding. (See *Mahler v. Eby*, 264 U. S. 32, 44). The court held that delegation of pure legislative power is unconstitutional and said that, in creating such an adminis-

trative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision and that the agency must pursue the procedure and rules and show substantial compliance therewith to give validity to its action. The court held also that lack of an express finding could not be supplied by inference. So, in that case, the Commission, after hearing, could not without an express finding of unreasonableness, fix rates which, in its judgment, would be fair and reasonable.

The same principle, in *Hampton & Co. v. United States*,
49 276 U. S. 394, 409, is applied to fixing customs. There however, specific rules were laid down to govern the President and findings of fact were required.

Prerequisites to action must be stated and compliance must be shown. If authority depends upon determination of facts, that determination must be shown. *Panama Refining Co. v. Ryan*, 293 U. S. 388 (11, 12).

The court, in *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38 (4), held that :

"In the fixing of rates—a legislative act—the legislature has a broad discretion which it may exercise directly or through a legislative agency authorized to act in accordance with standards prescribed by the legislature."

Headnote (7) of that case says:

"Where the legislature appoints a rate-fixing agent to act within the limits of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily."

Again, in *Morgan v. United States*, 304 U. S. 1, 14, the court said :

"The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing'—essential alike to the legal validity of the administrative regulation and to

the maintenance of public confidence in the value and soundness of this important governmental process."

Rate-making is a species of price fixing. "The problem of fixing reasonable prices for bituminous coal cannot be differentiated legally from the task of fixing rates under the Interstate Commerce Act (41 Stat. 484, 49 U. S. C. Sec. 15) and the Packers and Stockyards Act (42 Stat. 166, 7 U. S. C. Sec. 211). The latter provide the standard of 'just and reasonable' to guide the administrative body in the rate-making process."

50 In rate cases the administrative body is required not only to afford an opportunity for hearing but also to make findings of fact to support its conclusion that the rates are reasonable and just. See Mahler v. Eby, 264 U. S. 32, 44. That is said to be necessary to prevent the delegation of such power from being unconstitutional. If this act provided for a hearing and findings of fact and a conclusion that from those facts the rents fixed are, in the judgment of the administrator equitable and fair, then the Act might be construed to say that the maximum rent in any case shall be whatever the administrator finds to be equitable and fair.

Fixing fair and equitable prices is a legislative function. What the decisions mean is that, if Congress authorizes an administrator to fix such prices as he thinks are fair and equitable, it delegates legislative power, but if Congress says, in effect, that prices fixed on the basis of certain ascertained facts would be fair and equitable, and authorizes an administrator to ascertain those facts and to make a regulation containing, not his uncontrolled opinion, but the result of those facts, then Congress by designating the controlling facts fixes the prices and the administrator acts only as agent of congress in finding the facts and declaring the result. That is the reason why the price fixing acts require express findings of fact after hearing and that is why the Supreme Court says that express findings after hearing are necessary in order to prevent the authority of the administrator from being a pure delegation of legislative power contrary to the Constitution.

There is nothing to the contrary in the Opp Cotton Mills case, 312 U. S. 126. On page 145 of the opinion, the court says that the essentials of legislative function "are preserved when congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective." Throughout that case it is apparent that congress must declare the ultimate fact upon which a statute is to become operative and it may then leave the determination of the ultimate

fact to any administrative agent, but that, where, in order to ascertain the existence of the ultimate fact, it is necessary for such agent to exercise his judgment upon intermediate or subsidiary facts, he must make a record or express findings of the intermediate facts, so that "congress, the courts and the public can ascertain whether the agency has conformed to the standards which congress has prescribed." The court on page 145 of the opinion, says that congress need not itself find all the facts intermediate or subsidiary to the basic conclusion or ultimate fact in fixing a tariff rate, or a railroad rate or rate of wages. But the reasoning in that case seems to demand that the administrator expressly set out the subsidiary or intermediate facts from which he arrives at the "basic conclusions of fact," which the court says congress must specify. That is in line with other decisions of the Supreme Court which hold that express findings are essential to the validity of the regulation. The reason congress does not hear the subsidiary facts is because it is impossible or impracticable. If Congress heard the intermediate facts, it could arrive at the basic or ultimate conclusion and on that basis fix a price in the statute. But where, for practical reasons, congress only specifies the basic or ultimate fact and must rely upon an administrator to ascertain the existence of that basic fact, then, the Supreme Court says, the Constitution and fair play both require the administrator to record the subsidiary facts.

In the present case, the administrator, though contending that findings are not necessary, says he has made findings. That depends, of course, upon his definition of findings. Without reciting all the statements in the rent Declaration and in the 52 Regulation, it is sufficient to say that those documents, in effect, simply declare that in the administrator's judgment, the basic facts exist and do not contain findings of subsidiary facts such as the Supreme Court has held necessary.

If the requirement that the rent fixed shall be what the administrator thinks is "fair and equitable" be a standard, his so-called findings simply state that in his judgment they are fair and equitable without containing the intermediate facts which caused him to think so. The argument presented for the administrator creates the impression that the administrator construes the act to require him to ascertain prevailing rents at some base date and, with some adjustments, to fix those rents by regulation as fair and equitable. His apparent construction of the act is emphasized by the fact that by other regulations he included the entire United States as defense rental areas and froze rents as of his base date. The recent case of Brown, Admr. v. Ayello, 50 F. Supp. 391, seems to adopt somewhat the same view. It says

that "Congress recognized that it could not arbitrarily set a date for the fixing of prices, because of the inequality that would be bound to result. By naming a period for the guidance of the Administrator in fixing prices it set as definite a standard as practicable." With reference to the opinion of the Administrator and of the court in the Ayello case, it is submitted that such is not the meaning of the Act. Congress did not declare that fair and equitable rents should be such rents as prevailed on a base date and direct the Administrator to ascertain what such prevailing rents were. Prevailing rent is just one of the subsidiary facts to be considered, so far as practicable, in arriving at the basic fact, namely, what rent would be fair and equitable. Prevailing rent, therefore, is not a standard at all, but a subsidiary fact which, along with all other subsidiary facts, the administrator is bound to find and record. Moreover, the standard, which would prevent the act from being unconstitutional is not rents which in the judgment of the administrator are fair and equitable, but rents shown by ascertained and recorded facts to be fair and equitable.

The administrator urges further that, even if findings were necessary, they "may be supplied by implication." The contrary is held in the Wichita R. R. case, *supra*.

Moreover, the act would have to leave open for judicial determination the question of due process. See *Power Commission v. Pipeline Co.*, 315 U. S. 575 (4).

After the administrator fixes the maximum rent, the provision for protest and appeal, it is said, affords due process. It might do so theoretically but not actually. In the Morgan case, *supra*, the court held that "In administrative proceedings of a quasi-judicial character, the liberty and property of the citizen must be protected by the rudimentary requirements of fair play. These demand a fair and open hearing."

People know that they are charged with knowledge of the law, but, without actually knowing the law, they have been accustomed to make defenses only when the law is sought to be enforced against them. An act which permits an administrator to fix prices without notice or hearing and then makes those prices conclusive after 60 days would, in practical operation, have the effect of cutting off defenses. That is especially true where the procedure provided makes it too inconvenient and expensive for individuals in small cases to follow the procedure. Ordinarily, when Congress itself passes a law, it does not try to make the law immune from attack or prohibit defenses but permits defenses to be made at any time an individual is proceeded against under the law. If the matter is subject to very strict construction,

then this act may technically provide due process, but practically it would result in entrapping a large number of citizens. That might not constitute the fair play intended by the Supreme Court.

54 The Act, in effect, says that, for reasons set out, it is good policy to control rents during the war and then authorizes the administrator to fix such maximum rents as he thinks will be generally fair and equitable and will effectuate the purposes of the Act.

An express finding, if the administrator were required to make, that the prices fixed would effectuate the purposes of the Act, would not be a standard but a mere statement of opinion. Schechter Corp. v. United States, 295 U. S. 495 (8).

Under this Act, the administrator can fix rents without notice or hearing and without express findings of fact and with only such investigation as in his discretion he may decide to make. The standard is not what Congress thinks would be fair and equitable under designated facts but what the administrator, in his uncontrolled discretion, thinks would be fair and equitable.

Then, when the regulation is sought to be enforced against a defendant and he is forced into a local court, he finds that he cannot attack the validity of the act or the regulation and that if 60 days have elapsed, he cannot question whether the regulation is fair and equitable because it has become conclusive without notice or opportunity to be heard, except such notice as he is charged with by a law which, in effect, says that, though no proceeding has been instituted against him, he must protest in advance and appeal to a distant court or be concluded.

Conditions created by the war do not enlarge constitutional power. Congress must establish the standards of legal obligation. Schechter Corp. v. United States, 295 U. S. 495; 530.

It is easy for government agencies, some of which apparently are opposed to any limitation of their powers and are impatient

of all constitutional restrictions, to admit the limitations
55 stated in the constitution and then to ridicule the idea that their powers are affected by them. The act of the administrator in designating the entire United States as defense-rental areas affords an illustration of the dangerous tendency to assume and exercise powers never intended by Congress to be granted or by the Constitution to be exercised. That tendency makes apparent the wisdom of the rule laid down by the Supreme Court that any administrator in the exercise of his authority should be required to make express findings of the subsidiary facts on which he acts. Administrative agents have become so numerous and government by regulation so extensive that courts, it is to be

feared, may gradually yield to their unceasing insistence and permit the rights of the people to be destroyed and subject them to control by regulations, which result was never intended by the constitution, apparently regarded by some agencies as an outmoded instrument.

That rents should be controlled during the war cannot be reasonably doubted, but courts have no power to determine policy. To preserve the permanent constitutional liberties of the people is the sworn duty of courts (*Marbury v. Madison*, 5 U. S. 137, 178) and is not to be compared with some good end which might result from permitting government agencies to exercise unauthorized power by regulation because of some temporary emergency.

In the absence of some controlling decision a court cannot avoid the responsibility of deciding according to its own conviction. The conviction of this court is that the rent provisions of this Act are invalid.

56

In United States District Court

Motion for Amendment

Filed Sept. 14, 1943

Now comes Prentiss M. Brown, Administrator, Office of Price Administration, complainant, respectfully showing unto the Court as follows:

1. The order entered by the Court on September 1, 1943, dismissing this action orders that the motion to dismiss be sustained for the reasons stated in the opinion of this Court in the case of *John W. Payne vs. J. H. Griffin*; No. 89, Thomasville Division, Middle District of Georgia, a copy of which is filed as the opinion in this case and made a part of the record in this case.

2. The present action involves an issue not involved in the aforementioned case of *Payne vs. Griffin*, to wit: whether or not Section 204 (d) of the Emergency Price Control Act of 1942 constitutionally prohibits the Superior Court of Bibb County from assuming jurisdiction of the subject matter in the case of *Mrs. Kate C. Willingham vs. Andrew J. Lyndon, Rent Director*, No. 7508, October term, 1943.

Wherefore, complainant respectfully moves the Court that the order heretofore entered on September 1, 1943, dismissing this action be amended by adding thereto after the words "record in this case" the following:

"Nothing contained in the opinion of this Court in the aforementioned case of *Payne vs. Griffin* shall be taken as ruling that Sec-

tion 204 (d) of the Act is unconstitutional insofar as it operates or may operate to restrict the jurisdiction of the Superior Court of Bibb County, Georgia, in the case of Mrs. Kate C. Willingham vs. Andrew J. Lyndon, Rent Director, No. 7508, October term, 1943."

57 Complainant, therefore, respectfully prays that this, his motion, be sustained.

T. NELSON PARKER,
T. Nelson Parker,
Regional Attorney,

RALPH R. QUILLIAN,
Ralph R. Quillian,

Chief Attorney, Atlanta District Office.

L. P. WEBB,
L. P. Webb,

Chief Enforcement Attorney, Atlanta District Office,

Office of Price Administration,

44 Pryor Street, NE., Atlanta, Georgia.

GEORGE J. BURKE,
George J. Burke,

FLEMING JAMES
Fleming James,

Of Counsel,

Office of Price Administration,

Federal Office Building No. 1, Washington, D. C.

Attorneys for Complainant.

58

In United States District Court

Amendment of order of September 1, 1943

Filed Sept. 14, 1943

The foregoing motion having been presented and considered by the court, counsel for all parties being present,

It is now ordered that the order of September 1, 1943, be amended by adding thereto the following:

"The court does not deem it necessary to decide and does not decide whether Section 204 (d) of the Act is unconstitutional insofar as it operates or may operate to restrict the jurisdiction of the Superior Court of Bibb County, Georgia, in the case of Mrs. Kate C. Willingham vs. Andrew J. Lyndon, Rent Director, No. 7508, October Term, 1943."

This September 14, 1943.

BASCOM S. DEAVER,
United States District Judge.

59 In the District Court of the United States for the
Middle District of Georgia, Macon Division

[Title omitted.]

Application for appeal

Filed Sept. 30, 1943

Prentiss M. Brown, Administrator of the Office of Price Administration, an agency of the Government of the United States of America created by law, plaintiff herein, states that by order entered on the 1st day of September, 1943, a motion to dismiss the complaint herein, interposed by the defendant, was sustained by this Court, and that on the 14th day of September 1943, a motion for amendment of said order, interposed by the plaintiff, was sustained by the court. The plaintiff, feeling aggrieved by the ruling of the Court in sustaining said motion to dismiss by its order as amended, prays that he be allowed to appeal to the Supreme Court of the United States for a reversal of said order as amended, and of said judgment, and that a transcript of the record of this cause, duly authenticated, be sent to the Supreme Court of the United States.

The petitioner presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

Filed at Macon, Georgia, this 30 day of September 1943.

T. NELSON PARKER,

T. Nelson Parker,

Regional Attorney,

RALPH R. QUILLIAN,

Ralph R. Quillian,

Chief Attorney, Atlanta District Office,

L. P. WEBB,

L. P. Webb,

Chief Enforcement Attorney,

Atlanta District Office,

Office of Price Administration,

44 Pryor Street NE., Atlanta, Georgia.

GEORGE J. BURKE,

George J. Burke,

FLEMING JAMES, Jr.,

Fleming James, Jr.,

Of Counsel,

Office of Price Administration, Federal Office Building No. 1, Washington, D. C., Attorneys for Complainants.

69 In the District Court of the United States for the
Middle District of Georgia, Macon Division.

[Title omitted.]

Order allowing appeal

Filed Sept. 30, 1943

This cause having come on this day before the Court on petition of Prentiss M. Brown, Administrator of the Office of Price Administration, praying for the allowance of an appeal to the Supreme Court of the United States for a reversal of the order and judgment herein as amended, sustaining the defendants' motion to dismiss the complaint herein and requesting that a duly authenticated copy of the record of this cause be transmitted to the Clerk of the Supreme Court of the United States; the Court having heard and considered said petition, together with petitioner's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause, the same having been duly filed with the Clerk of this Court,

It is therefore ordered and adjudged that Prentiss M. Brown, as Administrator of the Office of Price Administration, be and he is hereby allowed an appeal to the Supreme Court of the United States from the order and judgment of this Court, as amended, sustaining the defendant's motion to dismiss the complaint herein, that a duly authenticated copy of the record in this case be transmitted to the Clerk of the Court, and that a citation be issued as provided by law.

It is further ordered that Prentiss M. Brown, as Administrator of the Office of Price Administration, be and he is hereby allowed a period of sixty days from the date hereof within which to file and docket said appeal in the Supreme Court of the United States.

Dated at Macon, Georgia, this 30th day of September, 1943.

(S) BASCOM S. DEAVER,

Bascom S. Deaver,

United States District Judge.

70 [Citation in usual form, filed Sept. 30, 1943, omitted in printing.]

71 In United States District Court

[Title omitted.]

Assignments of error

Filed Sept. 30, 1943

Prentiss M. Brown, as Administrator of the Office of Price Administration, having filed his application for appeal herein, now

states that as a result of the action taken by this Court in sustaining the defendants' motion to dismiss the complaint in this cause, there has intervened in said cause manifest error to his prejudice as Administrator of the Office of Price Administration, an agency of the Government of the United States, in the following respects:

1. The Court committed material error against the Administrator of the Office of Price Administration and against the United States of America in sustaining the defendants' motion to dismiss the complaint in the above entitled cause.

2. The Court committed material error against the Administrator of the Office of Price Administration and against the United States of America in sustaining the said motion to dismiss on the ground that the rent provisions of the Emergency Price Control Act of 1942 and the regulations pursuant thereto are unconstitutional and invalid, for the reasons stated in the opinion of this Court in the case of John W. Payne v. J. H. Griffin, No. 89, Thomasville Division, Middle District of Georgia, a copy of which was filed as the opinion in this cause and made a part of the record in this cause.

Filed at Macon, Georgia, this 30th day of September, 1943.

T. NELSON PARKER,

T. Nelson Parker,

Regional Attorney,

RALPH R. QUILLIAN,

Ralph R. Quillian,

Chief Attorney, Atlanta District Office,

L. P. WEBB,

L. P. Webb,

Chief Attorney, Atlanta District Office,

GEORGE J. BURKE, 44 Pryor Street NE., Atlanta, Georgia.

George J. Burke,

FLEMING JAMES, JR.,

Fleming James, Jr.,

Of Counsel,

Office of Price Administration, Federal Office Building No. 1, Washington, D. C., Attorneys for Complainant.

72 In United States District Court

[Title omitted.]

Stipulation as to record

Filed Sept. 30, 1943

It is hereby stipulated and agreed by and between counsel for all parties in this matter that the portions of the record to be in-

cluded in the transcript to be sent to the Supreme Court of the United States, in connection with the appeal herein of Prentiss M. Brown, Administrator of the Office of Price Administration, shall consist of those portions specified in the praecipe heretofore filed in this case by said Prentiss M. Brown.

Filed at Macon, Georgia, this 30th day of September 1943.

(S) RALPH R. QUILLIAN,

Ralph R. Quillian,

*Chief Attorney, Atlanta District Office,
Office of Price Administration.*

(S) CHAS J. BLOCH,

HALL & BLOCH,

Attorneys for defendants.

By (S) Chas J. Bloch.

73 In United States District Court

[Title omitted.]

Praecipe for record

Filed Sept. 30, 1943

To Clerk, United States District Court, Middle District of Georgia, Macon Division:

The appellant hereby requests that, in preparing the transcript of the record in the above entitled cause for his appeal to the Supreme Court of the United States, you include the following:

1. Docket entries showing filing of complaint, entry of rule nisi, filing of amendment to original complaint, entry of order allowing such amendment, filing of defensive pleading and motion to dismiss of Mrs. Kate C. Willingham, filing of defensive pleading and motion to dismiss of J. R. Hicks, Jr., filing of amendment to defensive pleading of Mrs. Kate C. Willingham, entry of order allowing such amendment, entry of order sustaining defendants' motion to dismiss, filing of motion for amendment of order of September 1, 1943.

2. Complaint and exhibit.
3. Summons and acknowledgment of service.
4. Rule Nisi.
5. Amendments to original complaint and notations of Orders allowing said amendments.
6. Defensive pleading and motion to dismiss of Mrs. Kate C. Willingham.
9. Defensive pleading and motion to dismiss of J. R. Hicks, Jr.
10. Amendment to defensive pleading of Mrs. Kate C. Willingham, and notation of order allowing said amendment.

11. Order of September 1, 1943, sustaining defendants' motion to dismiss.
12. Opinion of this Court in Payne v. Griffin, referred to in said order of September 1, 1943.
13. Motion for amendment of order of September 1, 1943.
14. Amendment of order of September 1, 1943.
- 74 15. Application for appeal to the Supreme Court of the United States.
16. Statement of jurisdiction of the Supreme Court of the United States.
17. Order allowing appeal.
18. Citation.
19. Assignments of error.
20. Stipulation of parties as to record.
21. Praeclipe for transcript of record.
22. Proof of service on appellees of application for appeal.
23. Statement to appellees directing their attention to the provision of Rule 12, paragraph 3, Rules of the Supreme Court of the United States.

Filed at Macon, Georgia, this 30th day of September 1943.

(S) T. NELSON PARKER,
T. Nelson Parker,
Regional Attorney,

(S) RALPH R. QUILLIAN,
Ralph R. Quillian,

Chief Attorney, Atlanta District Office,

(S) L. P. WEBB,
L. P. Webb,
Chief Enforcement Attorney, Atlanta District Office,
Office of Price Administration,
44 Pryor Street NE, Atlanta, Georgia.

(S) GEORGE J. BURKE,
George J. Burke,

(S) FLEMING JAMES, JR.,
Fleming James, Jr.,
Of Counsel.

Office of Price Administration,
Federal Office Building No. 1, Washington, D. C.
Attorneys for complainant.

78. Supreme Court of the United States.

Order noting probable jurisdiction

November 15, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is assigned for argument immediately following Nos. 374 and 375.

[File endorsement on cover:] File No. 47957. Middle Georgia, D. C. U. S., Term No. 464. Prentiss M. Brown, as Administrator of the Office of Price Administration, Appellant, vs. Mrs. Kate C. Willingham and J. R. Hicks, Jr. Filed October 29, 1943. Term No. 464 O. T. 1943.

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 464

PRENTISS M. BROWN, AS ADMINISTRATOR OF THE
OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

MRS. KATE C. WILLINGHAM AND J. R. HICKS, JR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE MIDDLE DISTRICT OF GEORGIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the plaintiff herein submits its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the decision of the district court entered in this cause on September 1, 1943, as amended by the order entered on September 14, 1943. The application for appeal was filed on September 30, 1943, and is presented to the district court herewith; to wit, on the 30th day of September 1943.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this case is conferred by Section 2 of the Act of August 24, 1937, 50 Stat. 752, 28 U. S. C. 349 (a). See *United States v. Rock Royal Co-op.*, 307 U. S. 533; *United States and Roach v. Johnson*, No. 840, 1942 Term.

STATUTE AND REGULATION INVOLVED

In pertinent part the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. Appendix 901, provides as follows:

SEC. 2. * . *

(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effec-

tuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequently to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area.

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for

such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

* * * * *

SEC. 4 (a). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

* * * * *

SEC. 204. * * *

(d) * * * The Emergency Court of Appeals, and the Supreme Court upon re-

view of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule or to restrain or enjoin the enforcement of any such provision.

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

The Designation of the Defense Rental Area here involved will be found in 7 Fed. Reg. 3193.

Maximum Rent Regulation No. 26 (7 Fed. Reg. 4905) provides in pertinent part as follows:

In the judgment of the Administrator, rents for housing accommodations within each of the Defense-Rental Areas set out in section 1388.1701 (a) of this Maximum Rent Regulation, as designated in the Designation and Rent Declaration issued by the Administrator on April 28, 1942, have not been reduced and stabilized by State or local regulation, or otherwise, in accordance with the recommendations set forth in said Designation and Rent Declaration.

The Administrator has ascertained and given due consideration to the rents prevailing for housing accommodations within each such Defense-Rental Area on or about April 1, 1941. It is his judgment that defense activities had not resulted in increases in rents for such housing accommodations inconsistent with the purposes of the Emergency Price Control Act of 1942 prior to April 1, 1941, but did result in such increases commencing on or about that date. The Administrator has made adjustments for such relevant factors as he has determined and deemed to be of general applicability in respect of such housing accommodations, including increases or decreases in property taxes and other costs.

In the judgment of the Administrator, the maximum rents established by this Maximum Rent Regulation for housing accommodations within each such Defense-Rental Area will be generally fair and equitable and will effectuate the purposes of the Emergency Price Control Act of 1942.

Therefore, under the authority vested in the Administrator by the Act, this Maximum Rent Regulation is hereby issued.

AUTHORITY: 1388.1701 to 1388.1714, inclusive, issued under the authority contained in Pub. Law 421, 77th Cong.

1388.1701 Scope of regulation.—(a) This Maximum Rent Regulation applies to all housing accommodations within each of the following Defense-Rental Areas (each of which is referred to hereinafter in this Maximum Rent Regulation as the "Defense-Rental Area"), as designated in the Designation and Rent Declaration (1388.1101 to 1388.1105, inclusive) issued by the Administrator on April 28, 1942, except as provided in paragraph (b) of this section:

* * * * *

(8) The Macon Defense-Rental Area, consisting of the counties of Bibb, Houston, and Peach, in the State of Georgia.

* * * * *

1388.1702 Prohibition against higher than maximum rents.—Regardless of any contract, agreement, lease or other obliga-

tion heretofore or hereafter entered into, no person shall demand or receive any rent for use or occupancy on and after the effective date of this Maximum Rent Regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this Maximum Rent Regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this Maximum Rent Regulation may be demanded or received.

1388.1704 Maximum rents.—Maximum rents (unless and until changed by the Administrator as provided in Section 1388.1705) shall be:

- (a) For housing accommodations rented on April 1, 1941, the rent for such accommodations on that date.
- (b) For housing accommodations not rented on April 1, 1941, but rented at any time during the two months ending on that date, the last rent for such accommodations during that two-month period.
- (c) For housing accommodations not rented on April 1, 1941, nor during the two months ending on that date, but rented prior to the effective date of this Maximum Rent Regulation, the first rent for such accommodations after April 1, 1941. The Administrator may order a decrease in the maximum rent as provided in Section 1388.1705 (c).
- (d) For (1) newly constructed housing accommodations without priority rating

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first rented after April 1, 1941, and before the effective date of this Maximum Rent Regulation, or (2) housing accommodations changed between those dates so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations changed between those dates from unfurnished to fully furnished, or from fully furnished to unfurnished, or (4) housing accommodations substantially changed between those dates by a major capital improvement as distinguished from ordinary repair, replacement, and maintenance, the first rent for such accommodations after such construction or change: *Provided, however,* That, where such first rent was fixed by a lease which was in force at the time of a major capital improvement, the maximum rent shall be the first rent after termination of such lease. The Administrator may order a decrease in the maximum rent as provided in Section 1388.1705 (e).

* * * * *

1388.1705 *Adjustments and other determinations.*—In the circumstances enumerated in this Section, the Administrator may issue an order changing the maximum rents otherwise allowable or the minimum services required. In those cases involving a major capital improvement, an increase or decrease in the furniture, furnishings or equipment, an increase or decrease of services, or deterioration, the adjustment

in the maximum rent shall be the amount the Administrator finds would have been on April 1, 1941, the difference in the rental value of the housing accommodations by reason of such change. In all other cases, except those under paragraphs (a) (7) and (e), (6) of this section, the adjustment shall be on the basis of the rent which the Administrator finds was generally prevailing in the Defense-Rental Area for comparable housing accommodations on April 1, 1941. In cases involving construction due consideration shall be given to increased costs of construction, if any, since April 1, 1941. In cases under paragraphs (a) (7) and (e), (6) of this Section the adjustment shall be on the basis of the rents which the Administrator finds were generally prevailing in the Defense-Rental Area for comparable housing accommodations during the year ending on April 1, 1941.

* * * * *

(c) The Administrator at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

(1) The maximum rent for housing accommodations under paragraphs (c), (d), or (g) of Section 1388.1704 is higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on April 1, 1941; or the

maximum rent for housing accommodations under paragraph (e) of Section 1388.1704 for which the rent was not fixed by the Administrator is higher than such generally prevailing rent.

* * * * *

1388.1709 Evasion.—The maximum rents and other requirements provided in this Maximum Rent Regulation shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease of housing accommodations, by way of absolute or conditional sale, sale with purchase money or other form of mortgage, or sale with option to repurchase, or by modification of the practices relating to payment of commissions or other charges, or by modification of the services furnished with housing accommodations, or otherwise.

THE ISSUES AND THE RULING BELOW

The case was decided on the bill of complaint and an answer which raised issues of law and prayed for a dismissal of the bill. The complaint may be summarized as follows:

On April 28, 1942, the Price Administrator, pursuant to Section 2 (b) of the Emergency Price Control Act, issued an order designating certain counties in Georgia as a Defense Rental Area. On July 1, 1942, the Price Administrator, pursuant to Section 2 (b) of the Act, issued Maximum Rent Regulation No. 26, establishing within the said

Defense Rental Area maximum rentals for housing accommodations. The base date employed for the maximum was April 1, 1941; in the case of housing accommodations not rented on April 1, 1942, but rented prior to the effective date of the Regulation, and housing accommodations newly constructed after April 1, 1941, and before the effective date of the Regulation, it was provided that the maximum rent should be the first rent for such accommodations after April 1, 1941, with authority reserved in the Administrator to order a decrease in the maximum rent where the rent established was higher than the rent generally prevailing in the Defense Rental Area for comparable housing accommodations on April 1, 1941. Maximum Rent Regulation No. 26, Sections 4 (c), 4 (d), 5 (e) (1). The defendant Willingham is a lessor of housing accommodations covered by Maximum Rent Regulation No. 26, rented for the first time after April 1, 1941, for which rentals were charged of \$60, \$40, and \$37.50 per month, respectively. The Area Rent Director, acting on behalf of the Administrator, after investigation sent to the defendant on June 14, 1943, written notice that such rentals were in excess of those generally prevailing in the Area for comparable accommodations and advised that the Director proposed to decrease the rents to \$37.50, \$27.50, and \$25 per month, respectively. The notice advised defendant that she had a right to rebut such finding and to file objections to such proposed

action within five days, and that in the absence of such objections an order would be entered decreasing such maximum rentals.

Before said order was issued by the Director, the defendant filed suit in the Superior Court of Bibb County, Georgia, to enjoin the Director from issuing the proposed order, on the ground that the Act and the Maximum Rent Regulation are unconstitutional. A restraining order was issued in that court on July 14, 1943, effective until further order of the court, restraining the Director from issuing any regulation or order decreasing rents being charged by the defendant for the housing accommodations in question.

The present suit was brought by the Price Administrator against the defendant Willingham and the Sheriff of Bibb County, Georgia, setting out the foregoing facts, asserting that the state court is without jurisdiction by virtue of Section 204 (d) of the Emergency Price Control Act and praying for a preliminary and final injunction to restrain defendant Willingham from further prosecution of the state court proceedings and from further acts and practices in violation of the Emergency Price Control Act and Maximum Rent Regulation No. 26, and to restrain defendant Hicks from executing or attempting to execute any orders in the state court proceedings.

The answer of defendant Willingham asserted that the Act and Regulation are unconstitutional as being in violation of the Fifth Amendment, and

constituting an unlawful delegation of legislative power, and that Section 204-(d) of the Act is unconstitutional as being in violation of Article VI of the Constitution. An answer was also filed by defendant Hicks. After hearing and argument on the prayers for dismissal of the bill, the district court on September 1, 1943, ordered the bill dismissed on the ground that the rent provisions of the Act and the Regulations pursuant thereto are unconstitutional, for the reasons stated in an opinion filed the same day in the case of *Payne v. Griffin*, which was made a part of the record in the present case. The opinion in that case held the rent provisions of the Act unconstitutional on the ground of delegation of legislative power. It also held that Section 204 (d) of the Act could not validly confine to the Emergency Court of Appeals a challenge to the validity of the statute and, derivatively, of the regulation.¹ The Price Administrator moved for an amendment of the order of September 1, 1943, to take cognizance of the fact that the present action involved an application of Section 204 (d) not present in the case of *Payne v. Griffin*, namely, the provision whereby state courts (together with federal courts except the Emergency Court of Appeals) are prohibited

¹ *Payne v. Griffin* was an action for treble damages brought in the federal court by a tenant against the landlord, in which the Administrator intervened. The decision on Section 204 (d) was addressed largely to a construction of that section advanced by the tenant.

from assuming jurisdiction of a suit to restrain the enforcement of the Act. The district court, acting upon the motion, amended its order of September 1, 1943, by adding thereto a statement to the effect that the court does not decide whether Section 204 (d) of the Act is unconstitutional in so far as it may operate to restrict the jurisdiction of the Superior Court of Bibb County, Georgia, in the suit brought by defendant Willingham against the Rent Director.

THE QUESTIONS ARE SUBSTANTIAL

1: The holding that the rent provisions of the Emergency Price Control Act are invalid on the ground of delegation of legislative power is in conflict with the decisions of numerous other courts.²

² *Brown v. Wright*, C. C. A. 4, decided Aug. 11, 1943, not yet reported; *Taylor v. Brown*, decided July 15, 1943, Emerg. Ct. of App. No. 10, OPA Servic 612:9; *Henderson v. Kimmel*, 47 F. Supp. 635 (D. Kan. 1942); *Brown v. Wick*, 48 F. Supp. 887 (E. D. Mich. 1943); *Brown v. Warner Holding Co.*, decided June 19, 1943, D. Minn., OPA Serv. 622:184; *Bias v. Sankey* (Brown, Intervenor), decided March 29, 1943, N. D. Ill., not yet reported; *United States v. Erlich*, decided April 13, 1943, S. D. Fla., not yet reported; *Brown v. Winter*, W. D. Wise., July 30, 1943, OPA Serv. 622:226; *Pratt v. Hollenbeck*, Ct. of Com. Pleas, Erie County, Pa., April 22, 1943, OPA Serv. 622:109; *Home Protective Savings & Loan Ass'n v. Robinson*, Ct. of Com. Pleas, Beaver County, Pa., May 11, 1943, OPA Serv. 622:122; *Brown v. Douglas*, N. D. Tex., July 17, 1943, OPA Serv. 622:228. *Contra: Roach v. Johnson*, N. D. Ind., reversed on other grounds, No. 840, 1942 Term, U. S. Sup. Ct.

The price control provisions of the Act have similarly been sustained in numerous cases as against an attack based on

2. The validity of Section 204 (d) in enforcement suits under the Act has likewise been sustained in numerous cases.² It should be observed that the relevance of Section 204 (d) to the decision in the present case is not entirely clear, since the Government takes the position that that

delegation of power: *Rottenberg v. United States*, C. C. A. 1, August 23, 1943, not yet reported; *United States v. C. Thomas Stores*, 49 F. Supp. 111 (D. Minn. 1943); *United States v. Slobodkin*, 48 F. Supp. 913 (D. Mass. 1943); *United States v. Hark*, 49 F. Supp. 95 (D. Mass. 1943); *United States v. Charney*, D. Mass., Dec. 17, 1942, QPA Serv. 620:66; *United States v. Sosnowitz*, D. Conn., March 25, 1943, OPA Serv. 620:103; *United States v. Friedman*, D. Conn., March 25, 1943, OPA Serv. 620:103; *Brown v. Ayello*, N. D. Cal., June 1, 1943, OPA Serv. 620:130; *Helena Rubinstein v. Charline's Cut Rate*, 28 A. (2d) 113 (N. J. Eq. Sept. 11, 1942).

² *Rottenberg v. United States*, C. C. A. 1, August 23, 1943, not yet reported; *Henderson v. Burd*, 133 F. (2d) 515 (C. C. A. 2, 1943); *Brown v. Okla. Operating Co.*, W. D. Okla., May 28, 1943, OPA Serv. 620:128; *Brown v. Warner Holding Co.*, D. Minn., June 29, 1943, OPA Serv. 622:183; *Brown v. Ayello*, N. D. Calif., June 1, 1943, OPA Serv. 620:130; *United States v. C. Thomas Stores, Inc.*, 49 F. Supp. 111 (D. Minn. 1943); *United States v. Slobodkin*, 48 F. Supp. 913 (D. Mass. 1943); *United States v. Friedman*, D. Conn., March 25, 1943, OPA Serv. 620:103; *United States v. Sosnowitz*, D. Conn., March 25, 1943, OPA Serv. 620:105; *Henderson v. Kimmel*, 47 F. Supp. 635 (D. Kan. 1942); *Courtwright v. Mohawk*, Cy. Ct., Forrest Cy., Miss., May Term, 1943, OPA Serv. 622:157; *Regan v. Kroger Grocery & Baking Co.*, Municipal Ct., Chicago, Ill., 1943, OPA Serv. 620:112; Cf. *Davies Warehouse Co. v. Brown*, Emerg. Ct. of App., No. 5, May 28, 1943, OPA Serv. 610:26, 30. *Contra: Brown v. Wyatt Food Stores*, 49 F. Supp. 538 (N. D. Tex. 1943). (In this case the ruling was on a motion to strike and hence the Administrator was unable to appeal. Judgment in favor of the Administrator was subsequently entered by consent.) . . .

section, while in terms precluding an attack on the validity of a particular Regulation in any court other than the Emergency Court of Appeals, does not preclude a challenge to the validity of the Act itself. Thus the issue of delegation of power, which the court herein treated as decisive, was concededly open to adjudication in this case. It is the Government's position that Section 204 (d) of the Act prohibits the bringing of suit by the defendant landlord in the state court to restrain the enforcement of the Act; in that aspect, however, the question of the validity of Section 204 (d) was expressly pretermitted by the district court in its amendatory order of September 14, 1943. If that question is raised on this appeal, it is noteworthy that the validity of Section 204 (d) insofar as it forbids both federal⁴ and state⁵ proceedings to restrain the enforcement of the Act has been repeatedly sustained.

3. The district court did not find it necessary to consider whether the present suit is affected

⁴ *Lockerty v. Phillips*, 63 S. Ct., 1019, decided May 10, 1943; *Brown v. Lee*, S. D. Cal., decided August —, 1943, OPA Serv. 622:219; *Henderson v. Kimmel*, 47 F. Supp. 635 (D. Kan. 1942); *Dieffenbaugh v. Cook*, 47 F. Supp. 645 (N. D. Ind. 1942); *Hatter v. Henderson*, S. D. Ala., decided July 28, 1942, OPA Serv. 622:1.

⁵ *Kittrell v. Hatter*, 10 So. (2d) 827 (Ala. 1942); *Dieffenbaugh v. Cook*, St. Joseph, Ind., Superior Ct. No. 2, Sept. 4, 1942, OPA Serv. 622:1; *Jenkins v. Mae Collum*, Cir. Ct., Winnebago County, Ill., June 1943, OPA Serv. 622:155; *Ritchie v. Johnson*, Dist. Ct., Salinas County, Kan., Sept. 3, 1943, not yet reported.

by Section 265 of the Judicial Code (28 U. S. C., sec. 379). Though not passed on below, the question will doubtless be open on this appeal under the Act of August 24, 1937, whether or not the question is a jurisdictional one. Cf. *United States v. Rock Royal Co-op*, 307 U. S. 533, 541, 568-571. Apart from the fact that the complaint herein seeks to enjoin not only the prosecution of the state proceeding but also further violations of the Act, Section 265 is inapplicable for the reason that the Administrator is here seeking to enforce a federal statute and that statute, as part of a plan for exclusive jurisdiction, expressly deprives the state court of the jurisdiction which the defendant has attempted to invoke. Cf. *Toucey v. New York Life Insurance Company*, 314 U. S. 118, 132-134. Two circuit courts of appeals and a number of district courts have sustained the Government's position in this respect.*

Filed: September 30, 1943.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

* *Brown v. Wright*, C. C. A. 4, decided Aug. 11, 1943, OPA Serv. 622:214; *Henderson v. Fleckinger*, C. C. A. 5, 1943, decided June 9, 1943, OPA Serv. 622:181; *Henderson v. Kimmel*, 47 F. Supp. 635 (D. Kan. 1942); *Brown v. Wilson*, OPA Serv. 622:81 (W. D. Wash., Feb. 18, 1943); *Brown v. Wick*, 48 F. Supp. 887 (E. D. Mich., 1943); *Brown v. Wood*, OPA Serv. 622:103 (N. D. Cal., Mar. 18, 1943); *Henderson v. Smith-Douglass Co.*, 44 F. Supp. 681 (E. D. Va., 1942); *Brown v. Lee*, S. D. Cal., March 23, 1943, OPA Serv. 622:98.

This case having been heard on Defendants' motion to dismiss the action, after argument of counsel thereon,

It is ordered that said motion to dismiss be sustained on the ground that the rent provisions of the Emergency Price Control Act of 1942 and the regulations promulgated pursuant thereto are unconstitutional and invalid, for the reasons stated in the opinion of this court in the case of *John W. Payne v. J. H. Griffin*, No. 89, Thomasville Division, Middle District of Georgia, a copy of which is filed as the opinion in this case and made a part of the record in this case.

The action is hereby dismissed.

This the 1st day of September 1943.

BASCOM S. DEAVER,

United States District Judge.

Filed: SEPTEMBER 1, 1943.

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE MIDDLE DISTRICT
OF GEORGIA, THOMASVILLE DIVISION

Civil Action No. 89

JOHN W. PAYNE, PLAINTIFF

v.

J. H. GRIFFIN, DEFENDANT

(August 30, 1943)

DEAVER, *District Judge:*

This suit was brought by a tenant against a landlord under Section 205 (e) of the Emergency Price Control Act of 1942 to recover a money judgment for an alleged violation of a regulation as therein provided. Defendant moved to dismiss on the ground that the act and the regulation creating the right of action are unconstitutional and void. The plaintiff contends that this court has no jurisdiction to pass upon the constitutionality of either the act or the regulation. The Administrator came into the case by intervention. He admits jurisdiction to determine the constitutionality of the act but denies jurisdiction to question the validity of the regulation.

I

JURISDICTION

The act confers jurisdiction to try this case but in Section 204 (d) says that

The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside in whole or in part, any provisions of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

By Article 3, Section 1, of the constitution, the judicial power of the United States is vested in a Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

A district court can entertain only such cases as Congress gives it jurisdiction to try. Jurisdiction to try any case or class of cases may be withheld altogether. But once Congress confers jurisdiction to try a case it cannot withhold power to decide the case according to the applicable law. The contention of the plaintiff is contrary to the decisions of the Supreme Court from *Marbury v. Madison*, 5 U. S. 137, down through the years to the present time.

If Congress prohibits an inferior court from trying a case, the court cannot entertain it and, if Congress confers jurisdiction to try a case, the court cannot refuse to accept jurisdiction. It is bound to hear and decide the case. But, having directed the court to try the case, Congress has no authority also to direct the court to render judgment in accordance with the terms of a void act in disregard of the supreme law of the land. The distinction is that, while Congress can determine what cases a court can try, it cannot direct what law shall control the decision.

In *Adkins v. Children's Hospital*, 261 U. S. 525, 544 is the following language:

"The Constitution, by its own terms, is the supreme law of the land, emanating from the people, the repository of ultimate sovereignty under our form of government. A congressional statute, on the other hand, is the act of an agency of this sovereign authority and if it conflict with the Constitution must fall; for that which is not supreme must yield to that which is. To hold it invalid (if it be invalid) is a plain exercise of the judicial power—that power vested in courts to enable them to administer justice according to law. From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding on no one. This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the

power to hear and dispose of a case or controversy, properly before the court, to the determination of which must be brought the test and measure of the law.

In *Smyth v. Ames*, 169 U. S. 466, 527, the court said:

The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired, or destroyed by legislation.

See *Muskrat v. United States*, 219 U. S. 346, 359; 2 Story on the Constitution, p. 451, citing *Osborn v. Bank*, 9 Wheat. 819.

Again, the Supreme Court, in *United States v. Butler*, 297 U. S. 1, 62, said:

There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land, ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, to lay the article of the Constitution which is invoked beside the statute which

is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

The Supreme Court, in *Carter v. Carter Coal Company*, 298 U. S. 238, 296, again spoke, as follows:

The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior statute whenever the two conflict. In the discharge of that duty, the opinion of the lawmakers that a statute passed by them is valid must be given great weight, *Addkins v. Children's Hospital*, 261 U. S. 525, 544; but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry. *Schechter v. United States*, 295 U. S. 495, 549 550.

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not." *Chicago, etc., Railway Co. v. Wellman*, 143 U. S. 339, 345.

An unconstitutional law is no law and no court is bound to enforce it. 11 Am. Jur. p. 827, Sec. 148.

If a court has jurisdiction to try a case, it has inherent power to determine whether an act on which the existence of the right of action depends, conforms to the Constitution. See 11 Am. Jur. p. 709, Secs. 86, 88, and cases cited in support of the text.

Decisions might be multiplied almost without number but those cited are sufficient to show that the power of Congress to limit the jurisdiction of inferior courts refers to the character of cases and does not include power to limit the law to be applied in the trial of cases which the court has jurisdiction to hear. See *In re American States Public Service Co.*, 12 F. Supp. 667, 690.

A contrary conclusion would enable Congress to require courts to enforce any act though clearly void. "Congress have not power to give original jurisdiction to the Supreme Court in cases other than those described in the constitution." *Marbury v. Madison*, 5 U. S. 137 (2). If Congress can withhold power to determine the validity of an act from one inferior court, it could withhold

such power from all inferior courts. It would follow that Congress could require an inferior court to render judgment in a case depending entirely on a void statute and prevent its validity from being passed upon by any inferior court. In a case, therefore, of which the Supreme Court has no original jurisdiction, the validity of the act could never be questioned in any court.

It is apparently well settled that, while Congress can prohibit an inferior court from trying a case at all, it cannot authorize such a court to try a case and at the same time prevent the court from trying it according to the supreme law of the land. "Determination of a constitutional question is necessary and proper whenever it is essential to the decision of the case, as where the right of a party is founded solely on a statute, the validity of which his attacked." 16 C. J. S. p. 214.

The contention of the Administrator stands no better. In this case plaintiff is asking a judgment for money against the defendant. If a right to such judgment exists at all, it exists solely by reason of the statute and the regulation made pursuant to the statute. If the statute is valid and the regulation is valid, they together create a cause of action for violation of the regulation. If the statute is not valid, the regulation is nothing and no cause of action exists. Jurisdiction to try the case is jurisdiction to determine whether plaintiff by law is entitled to recover. To decide that question the court is bound to ascertain what law governs. If the regulation is valid, it has the force of law but it is no law apart from the statute itself. The statute and the regulation are inter-

dependent in creating the cause of action and there is no cause of action unless both are valid. Whether either is valid depends upon its conformity to the supreme law of the land. If by that law the statute is void, the regulation falls and there is no law authorizing judgment in favor of plaintiff.

The very question, therefore, which Congress forces this court to determine, by conferring jurisdiction to try the case, namely, the question of whether plaintiff by law is entitled to recover, depends upon the validity of the statute which creates the cause of action. The authorities applicable to the contention of the plaintiff are equally applicable to the contention of the Administrator.

When Congress withdraws from a court equity jurisdiction to enjoin the enforcement of a regulation, it does not call upon the court to act but, indeed, prohibits it from entertaining the suit at all. But when Congress directs a court to enforce a regulation by rendering a money judgment, the court is bound to decide whether such judgment is authorized by law, and a regulation made in pursuance of a statute in conflict with the Constitution is not law. See *Lockerty v. Phillips*, 63 S. Ct. 1019, 1023. See also *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (13), holding that:

Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.

II

CONSTITUTIONALITY

The attack here made relates, not to the entire act, but only to the rent provisions. The war powers of Congress are not questioned. The power of Congress to enact a statute controlling rents in time of war is not denied. One of the contentions is that Congress has not passed a statute regulating rents, to be administered by an administrator, but has undertaken to authorize the Administrator so to legislate.

To urge that Article 1, Section 8, of the Constitution settles the matter is to miss the question. That Article grants powers but it does not authorize Congress to delegate those powers.

Congress has power to enact a law to become effective when certain conditions come into existence and may delegate to an administrative officer the authority to determine, in accordance with the standard laid down by Congress, when the conditions have come into existence. Or, Congress may declare a policy and fix a definite standard by which the administrator is to be controlled and authorize him to make subordinate rules for the administration of the Act. However, Congress cannot permit the administrator to determine what the law shall be.

In the present statute Congress declares that, for reasons set out, it is good policy to stabilize prices including rents. It then provides for an administrator and authorizes him to "issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act." The administrator is

authorized, but not required, to make such investigation as he deems necessary or proper to assist him in making and enforcing regulations, and may take official notice of economic data and other facts. As to rent, the Act defines a defense-rental area as the District of Columbia and any area designated by the administrator as an area where defense activities have resulted or threatened to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act. Under Section 2 (b), the administrator may, by regulation, fix such maximum rents as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. So far as practicable, the administrator is to ascertain and give due consideration to rents prevailing about April 1, 1941. The Act provides for protest within 60 days and after that the regulation is conclusive and no protest can be made except on new grounds arising after the 60-day period.

In 11 Am. Jur. p. 957; Sec. 240, it is said that:

Thus, the authority attempted to be delegated to the President by Congress under the National Industrial Recovery Act, limiting his powers in no way and extending his discretion to all the varieties of laws which he might deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country, thereby allowing him to impose within his discretion his own conditions to effectuate a so-called policy, which was merely a statement of opinion, was such a sweeping delegation of powers properly exercisable only by the legislature itself as to fall beyond the pale of constitutional

limits. "There can be no grant to the executive of any roving commission to inquire into evils and, upon discovering them, to do anything he pleases to correct them."

As to delegation of legislative power, the Supreme Court, in *Field & Co. v. Clark*, 143 U. S. 649, 694, quoted the following language:

The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.

In *Wichita R. R. v. Pub. Utilities Comm.*, 260 U. S. 48, the court was dealing with the power of an administrative body to fix rates. The act there required the Commission, after hearing and investigation, to find existing rates to be unreasonable before reducing them but there was no requirement that the order should contain the finding. (See *Mahler v. Eby*, 264 U. S. 32, 44.) The court held that delegation of pure legislative power is unconstitutional and said that, in creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision and that the agency must pursue the procedure and rules and show substantial compliance therewith to give validity to its action. The court held also that lack of an express finding could not be supplied by inference. So, in that case, the Commission, after hearing, could not, without an express finding of unreasonableness, fix rates which, in its judgment, would be fair and reasonable.

The same principle, in *Hampton & Co. v. United States*, 276 U. S. 394, 409, is applied to fixing customs. There, however, specific rules were laid down to govern the President and findings of fact were required.

Prerequisites to action must be stated and compliance must be shown. If authority depends upon determination of facts, that determination must be shown. *Panama Refining Co. v. Ryan*, 293 U. S. 388 (11, 12).

The court, in *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38 (4), held that:

In the fixing of rates—a legislative act—the legislature has a broad discretion which it may exercise directly or through a legislative agency authorized to act in accordance with standards prescribed by the legislature.

Headnote (7) of that case says:

Where the legislature appoints a rate-fixing agent to act within the limits of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met; as in according a fair hearing and acting upon evidence and not arbitrarily.

Again, in *Morgan v. United States*, 304 U. S. 1, 14, the court said:

The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this

field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing"—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process.

Rate-making is a species of price fixing. "The problem of fixing reasonable prices for bituminous coal cannot be differentiated legally from the task of fixing rates under the Interstate Commerce Act (41 Stat. 484, 49 U. S. C. Sec. 15) and the Packers and Stockyards Act (42 Stat. 166, 7 U. S. C. Sec. 211). The latter provide the standard of 'just and reasonable' to guide the administrative body in the rate-making process."

In rate-cases the administrative body is required not only to afford an opportunity for hearing but also to make findings of fact to support its conclusions that the rates are reasonable and just. See *Mahler v. Eby*, 264 U. S. 32, 44. That is said to be necessary to prevent the delegation of such power from being unconstitutional. If this act provided for a hearing and findings of fact and a conclusion that from those facts the rents fixed are, in the judgment of the administrator equitable and fair, then the Act might be con-

strued to say that the maximum rent in any case shall be whatever the administrator finds to be equitable and fair.

Fixing fair and equitable prices is a legislative function. What the decisions mean is that, if Congress authorizes an administrator to fix such prices as he thinks are fair and equitable, it delegates legislative power, but if Congress says, in effect, that prices fixed on the basis of certain ascertained facts would be fair and equitable, and authorizes an administrator to ascertain those facts and to make a regulation containing, not his uncontrollable opinion, but the result of those facts, then Congress by designating the controlling facts fixes the prices and the administrator acts only as agent of Congress in finding the facts and declaring the result. That is the reason why the price fixing acts require express findings of fact after hearing and that is why the Supreme Court says that express findings after hearing are necessary in order to prevent the authority of the administrator from being a pure delegation of legislative power contrary to the Constitution.

There is nothing to the contrary in the *Opp Cotton Mills case*, 312 U. S. 126. On page 145 of the opinion, the court says that the essentials of legislative function "are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective." Throughout that case it is apparent that Congress must declare the ultimate fact upon which a statute is to become operative and it may then leave the determination of the ultimate fact to any admin-

istrative agent, but that, where, in order to ascertain the existence of the ultimate fact, it is necessary for such agent to exercise his judgment upon intermediate or subsidiary facts, he must make a record or express findings of the intermediate facts, so that "Congress, the courts and the public can ascertain whether the agency has conformed to the standards which congress has prescribed." The court on page 145 of the opinion, says that Congress need not itself find all the facts intermediate or subsidiary to the basic conclusion or ultimate fact in fixing a tariff rate, or a railroad rate or rate of wages. But the reasoning in that case seems to demand that the administrator expressly set out the subsidiary or intermediate facts from which he arrives at the "basic conclusions of fact," which the court says Congress must specify. That is in line with other decisions of the Supreme Court which hold that express findings are essential to the validity of the regulation. The reason Congress does not hear the subsidiary facts is because it is impossible or impracticable. If Congress heard the intermediate facts, it could arrive at the basic or ultimate conclusion and on that basis fix a price in the statute. But where, for practical reasons, Congress only specifies the basic or ultimate fact and must rely upon an administrator to ascertain the existence of that basic fact, then, the Supreme Court says, the Constitution and fair play both require the administrator to record the subsidiary facts.

In the present case, the administrator, though contending that findings are not necessary, says he has made findings. That depends, of course,

upon his definition of findings. Without reciting all the statements in the rent Declaration and in the Regulation, it is sufficient to say that those documents, in effect, simply declare that in the administrator's judgment, the basic facts exist and do not contain findings of subsidiary facts such as the Supreme Court has held necessary.

If the requirement that the rent fixed shall be what the administrator thinks is "fair and equitable" be a standard, his so-called findings simply state that in his judgment they are fair and equitable without containing the intermediate facts which caused him to think so. The argument presented for the administrator creates the impression that the administrator construes the act to require him to ascertain prevailing rents at some base date and, with some adjustments, to fix those rents by regulation as fair and equitable. His apparent construction of the act is emphasized by the fact that by other regulations he included the entire United States as defense rental areas and froze rents as of his base date. The recent case of *Brown, Admr. v. Ayello*, 50 F. Supp. 391, seems to adopt somewhat the same view. It says that "Congress recognized that it could not arbitrarily set a date for the fixing of prices, because of the inequality that would be bound to result. By naming a period for the guidance of the Administrator in fixing prices it set as definite a standard as practicable." With deference to the opinion of the Administrator and of the court in the *Ayello* case, it is submitted that such is not the meaning of the Act. Congress did not declare that fair and equitable rents should be such rents as prevailed on a base date and direct

the Administrator to ascertain what such prevailing rents were. Prevailing rent is just one of the subsidiary facts to be considered, so far as practicable, in arriving at the basic fact, namely, what rent would be fair and equitable. Prevailing rent, therefore, is not a standard at all, but a subsidiary fact which, along with all other subsidiary facts, the administrator is bound to find and record. Moreover, the standard, which would prevent the act from being unconstitutional is not rents which in the judgment of the administrator are fair and equitable, but rents shown by ascertained and recorded facts to be fair and equitable.

The administrator urges further that, even if findings were necessary, they "may be supplied by implication." The contrary is held in the *Wichita R. R.* case, *suprā*.

Moreover, the act would have to leave open for judicial determination the question of due process. See *Power Commission v. Pipeline Co.*, 315 U. S. 575 (4).

After the administrator fixes the maximum rent, the provision for protest and appeal, it is said, affords due process. It might do so theoretically but not actually. In the *Morgan* case, *suprā*, the court held that "In administrative proceedings of a quasi-judicial character, the liberty and property of the citizen must be protected by the rudimentary requirements of fair play. These demand a fair and open hearing."

People know that they are charged with knowledge of the law but, without actually knowing the law, they have been accustomed to make defenses only when the law is sought to be enforced against them. An act which permits an administrator

to fix prices without notice or hearing and then makes those prices conclusive after 60 days would, in practical operation, have the effect of cutting off defenses. That is especially true where the procedure provided makes it too inconvenient and expensive for individuals in small cases to follow the procedure. Ordinarily, when Congress itself passes a law, it does not try to make the law immune from attack or prohibit defenses but permits defenses to be made at any time an individual is proceeded against under the law. If the matter is subject to very strict construction, then this act may technically provide due process, but practically it would result in entrapping a large number of citizens. That might not constitute the fair play intended by the Supreme Court.

The Act, in effect, says that, for reasons set out, it is good policy to control rents during the war, and then authorizes the administrator to fix such maximum rents as he thinks will be generally fair and equitable and will effectuate the purposes of the Act.

An express finding, if the administrator were required to make, that the prices fixed would effectuate the purposes of the Act, would not be a standard but a mere statement of opinion. *Schechter Corp. v. United States*, 295 U. S. 495 (8).

Under this Act, the administrator can fix rents without notice or hearing and without express findings of fact and with only such investigation as in his discretion he may decide to make. The standard is not what Congress thinks would be fair and equitable under designated facts, but what

the administrator, in his uncontrolled discretion, thinks would be fair and equitable.

Then, when the regulation is sought to be enforced against a defendant, and he is forced into a local court, he finds that he cannot attack the validity of the act or the regulation and that, if 60 days have elapsed, he cannot question whether the regulation is fair and equitable, because it has become conclusive without notice or opportunity to be heard, except such notice as he is charged with by a law which, in effect, says that, though no proceeding has been instituted against him, he must protest in advance and appeal to a distant court or be concluded.

Conditions created by the war do not enlarge constitutional power. Congress must establish the standards of legal obligation. *Schechter Corp. v. United States*, 295 U. S. 495, 530.

It is easy for government agencies, some of which apparently are opposed to any limitation of their powers and are impatient of all constitutional restrictions, to admit the limitations stated in the Constitution and then to ridicule the idea that their powers are affected by them. The act of the administrator in designating the entire United States as defense-rental areas affords an illustration of the dangerous tendency to assume and exercise powers never intended by Congress to be granted or by the Constitution to be exercised. That tendency makes apparent the wisdom of the rule laid down by the Supreme Court that any administrator in the exercise of his authority should be required to make express findings of the subsidiary facts on which he acts. Administrative agents have become so numerous, and gov-

ernment by regulation so extensive, that courts, it is to be feared, may gradually yield to their unceasing insistence and permit the rights of the people to be destroyed and subject them to control by regulations, which result was never intended by the Constitution, apparently regarded by some agencies as an outmoded instrument.

That rents should be controlled during the war cannot be reasonably doubted, but courts have no power to determine policy. To preserve the permanent constitutional liberties of the people is the sworn duty of courts (*Marbury v. Madison*, 5 U. S. 137, 178) and is not to be compared with some good end which might result from permitting government agencies to exercise unauthorized power by regulation because of some temporary emergency.

In the absence of some controlling decision, a court cannot avoid the responsibility of deciding according to its own conviction. The conviction of this court is that the rent provisions of this Act are invalid.

Filed: August 30, 1943.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 464

CHESTER BOWLES, AS ADMINISTRATOR OF THE OFFICE
OF PRICE ADMINISTRATION, APPELLANT,

v.

MRS. KATE C. WILLINGHAM AND J. R. HICKS, JR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE MIDDLE DISTRICT OF GEORGIA

BRIEF FOR APPELLANT

OPINION BELOW

The District Court entered as its opinion in this case an opinion filed by it in the case of *Payne v. Griffin*, 51 F₂ Supp. 588 (M. D. Ga. 1943). The opinion appears at R. 26-38.

JURISDICTION

The judgment of the District Court was entered on September 1, 1943 (R. 26). The judgment was amended by order of September 14, 1943 (R. 39). Application for appeal was filed and appeal was allowed on September 30, 1943 (R. 40, 41). Prob-

able jurisdiction was noted on November 15, 1943 (R. 45). The jurisdiction of this Court rests on the Act of August 24, 1937, 50 Stat. 752, 28 U. S. C. Sec. 349a.

QUESTIONS PRESENTED

1. Whether the Emergency Price Control Act of 1942 delegates legislative power in respect of rent control in violation of Article 1; Section 1 of the Constitution.
2. Whether the Act, as here applied, satisfies the requirements of procedural due process.
3. Whether Section 265 of the Judicial Code bars this suit by the Administrator for injunctive relief.

STATUTES AND REGULATIONS INVOLVED

In the Appendix will be found the text of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U. S. C. App. 901; a "typical" maximum rent regulation; and Revised Procedural Regulation No. 3, issued January 12, 1943, as amended, 8 Fed. Reg. 526, 1798, 3534, 5481, 14811. The rent regulation as printed is in all material respects the same as Maximum Rent Regulation No. 26, issued June 30, 1942, 7 Fed. Reg. 4905, here involved. The Designation of 28 Defense Rental Areas and Rent Declaration Relating to Such Areas, issued April 28, 1942, preceding the issuance of Maximum Rent Regulation No. 26, will be found in 7 Fed. Reg. 3193.

STATEMENT

This is a direct appeal by the Administrator of the Office of Price Administration from a judgment of the District Court of the United States for the Middle District of Georgia, dismissing the Administrator's complaint for an injunction to restrain defendants, appellees herein, from violating the Emergency Price Control Act and interfering with its administration or with the effectuation of its policies by obstructing, through the injunctive processes of a state court, the issuance of rent reduction orders under the Act. By order of September 1, 1943, the district court, sustaining defendant's motion to dismiss, dismissed the Administrator's suit on the ground that the rent provisions of the Act, and the regulations thereunder, are unconstitutional for the reasons stated in the opinion filed by the court the same day in *Payne v. Griffin* (R. 16-20, 21-26, 26-38). The history of the present proceeding is as follows.

1. THE RENT REGULATION, THE RENT REDUCTION ORDERS, AND THE STATE COURT PROCEEDINGS

On April 28, 1942, the Administrator, pursuant to Section 2 (b) of the Act, issued a Designation and Rent Declaration which set forth the Administrator's findings concerning the necessity for control and stabilization of rents in twenty-eight areas in various parts of the country, embodied recommendations for this purpose which might be

acted on by State and local agencies, and designated these areas as "Defense-Rental Areas."¹ Included in this group of Defense-Rental Areas was the Macon, Georgia, Area (7 F. R. 3193).

On June 30, 1942, the Administrator, finding that rents had not been stabilized or reduced in the Macon Defense-Rental Area by State or local regulation, or otherwise, issued Maximum Rent Regulation No. 26, effective July 1, 1942, establishing the maximum legal rents for housing accommodations in the area (7 F. R. 4905; Rent Reg., *infra*). In accordance with the provision of the Act (Sec. 2 (b)) that due consideration be given to rents prevailing on or about April 1, 1941, Maximum Rent Regulation No. 26 established April 1, 1941, as the base date for maximum legal rents in the area; rents in effect on that date were to be the maximum legal rents (Rent Reg., *infra*, Sec. 4 (a)). The Administrator's duties under the Regulation were vested in a Rent Director for the area (Act, Sec. 201 (b); Regula-

¹ The issuance of a Designation and Rent Declaration with respect to these Defense Rental Areas was part of a simultaneous nationwide designation of 302 areas, the first large-scale formal action taken under the statute looking to the control and stabilization of rents during the present war. Twenty-one areas had been previously designated (7 F. R. 1675-1694, 2598). The 28 areas mentioned in the text were designated separately from other groups of areas among the 302 on the basis of the respective base dates recommended by the Administrator, i. e., the respective dates recommended as marking proper pre-inflationary levels for maximum legal rents under the Act in the several groups of areas.

tion, Sec. 1388.1713 (2), (3); Rent Reg., *infra*, Sec. 13 (1), (2)).²

As respects housing accommodations not rented on April 1, 1941, but rented for the first time between that date and the effective date of the Regulation, July 1, 1942—the situation involved in this suit—the Regulation provided that the maximum legal rent should be the first rent charged after April 1, 1941; but that the Administrator (by designation, the Rent Director) might order a decrease on his own initiative on the ground, among others, that the rent was higher than that generally prevailing in the Defense-Rental Area for comparable accommodations on April 1, 1941 (Sects. 1388.1704 (e), 1388.1705 (e) (1); Rent Reg., *infra*, Sects. 4 (e), 5 (e) (1)). By a separate procedural regulation issued pursuant to Sections 203 and 201 (d) of the Act (Revised Procedural Regulation No. 3, as amended, 8 F. R. 526, 1798, 3534, 5481, 14811, Sects. 1300.207, 1300.209, 1300.210, subpart C, Proc. Reg., *infra*), provision is made for notice to the landlord in such cases, and for administrative review of action adverse to the landlord.³

² *Avant et al. v. Bowles*, now pending in the Emergency Court of Appeals (Docket No. 63, submitted October 1943), raises questions as to the validity of Maximum Rent Regulation No. 26, including the question as to the validity of the Administrator's selection of the base date. The appellees herein are not parties to the *Avant* proceeding.

³ The procedure for judicial review is governed by Section 204 of the Act. The review procedure, administrative and judicial, is more fully described at pp. 31-36, *infra*.

On June 14 and 15, 1943, the Rent Director for the Macon area sent written notices to Mrs. Kate C. Willingham, appellee herein, stating that, on the basis of a preliminary investigation with respect to housing accommodations owned by her at 20 Arlington Place, Macon, consisting of three apartments, two unfurnished and one furnished, which had not been rented on April 1, 1941, but were first rented on July 1 and August 1, 1941, respectively, the Rent Director proposed, pursuant to Section 1388.1705 (e) (1), of the Regulation (Rent Reg., *infra*, Sec. 5 (c) (1)), to decrease the maximum rents for these apartments respectively from \$40.00 to \$27.50, from \$37.50 to \$25.00, and from \$60.00 to \$37.50 per month, on the ground that the first rents for these apartments received after April 1, 1941, were in excess of those generally prevailing in the area for comparable accommodations on April 1, 1941. The notices further advised Mrs. Willingham that she might file objections supported by written evidence within five days from the date of notice; and that if such filing were not made within the five days the Rent Director proposed to enter an order decreasing the maximum rent. (R. 12-13.)⁴ Thereafter Mrs. Willingham filed her objections and supporting affidavits. On July 5, 1943, the Rent

⁴ Mrs. Willingham wrote on June 15 and 16, 1943 objecting informally and generally to the proposed rent reduction orders. This fact does not appear in the pleadings.

Director advised Mrs. Willingham in writing that he would proceed to issue an order as soon as practicable. (R. 2-3, 12-13.)

Before the Rent Director issued an order, Mrs. Willingham filed a petition in the Superior Court of Bibb County, Georgia,⁵ setting forth in substance the proceedings described above with respect to the proposed orders; averring that the orders had not yet been issued, that petitioner would not have an adequate remedy at law if they should be issued, and that the orders, the Rent Regulation and the Act are unconstitutional on various grounds; and praying that the Rent Director be restrained from issuing the proposed orders or any orders reducing the rents for petitioner's property at 20 Arlington Place, Macon (R. 9-16). The Superior Court on July 14, 1943, entered, *ex parte*, a restraining order as prayed, effective until further order of the court; and further ordered the Rent Director to show cause on September 6, 1943, why an injunction should not issue (R. 16).

2. THE PROCEEDINGS BELOW

The Administrator's complaint was filed in the district court on July 20, 1943 (R. 1), and was amended on August 16, 1943 (R. 7-9). The complaint set forth the facts with respect to the rent

⁵ The Administrator's complaint incorrectly states (R. 3) that the petition was filed before the expiration of the five-day period prescribed in the notices of June 14 and 15, 1943, *supra*.

reduction order proceedings and the State court suit essentially as heretofore stated (R. 2-3); averred that, in the judgment of the Administrator, defendant Willingham had thereby engaged in acts and practices which constituted violations and attempted violations of the Act and the Regulation (R. 1-2, 3); and averred that defendant Hicks is the elected Sheriff of Bibb County, Georgia (R. 3). The complaint further alleged that the restraining order entered by the State court is void for lack of jurisdiction of the subject matter in view of the provisions of Section 204 (d) of the Act (R. 3). The complaint invoked the injunctive processes of the District Court pursuant to Section 205 (a) of the Act and pursuant to Section 24 (1) of the Judicial Code, respectively, (1) to restrain violations and attempted violations of the Act and Regulation, and to enforce compliance therewith (R. 2, 7); and (2) "to effectuate the public policy of a statute of the United States" (R. 3, 7). The complaint averred that the Administrator was without an adequate remedy at law and would suffer irreparable damage "in the disruption and obstruction of the rent control program within the United States" unless the court intervened in his behalf (R. 3). A preliminary and final injunction was prayed to restrain defendant Willingham from further prosecution of the State court proceedings and from further acts and practices in violation of the Emergency Price

Control Act and Maximum Rent Regulation No. 26, and to restrain defendant Hicks from executing or attempting to execute any orders in the State court proceedings (R. 4).

Defendant Willingham filed an answer and amendment thereto admitting the essential allegations of fact in the complaint, denying violation of the law, and raising issues of law (R. 16-20, 21-26). Defendant Hicks filed an answer averring that the complaint failed to state a cause of action against him (R. 20). Both defendants prayed for a dismissal of the complaint (R. 19, 20). The answer of defendant Willingham alleged that the complaint failed to state a cause of action in that defendant had not violated the law but had merely invoked the injunctive processes of the State court to restrain the performance of unlawful acts by the Rent Director (R. 17, 18); that the relief sought by the complaint was barred by Section 265 of the Judicial Code (R. 17); that Section 2 (b) of the Act is unconstitutional as involving an unlawful delegation of legislative power (R. 21-22, 24-25); that Section 204 (d) of the Act, as applied to the State court proceeding, is unconstitutional as a violation of Article VI of the Constitution (R.

* The answer of the defendant Willingham also prayed that the Administrator and his officers be restrained from issuing the orders involved in the State court proceedings for the reasons set out in the petition in that proceeding (R. 9-16, 20).

18-19, 23-24); that Section 204 (d), "as applied to this Court under the circumstances of this case" is unconstitutional (R. 25-26); that Maximum Rent Regulation No. 26 is unconstitutional and void as a violation of the Fifth Amendment, as constituting an improper delegation of legislative and judicial power, as being too vague and indefinite to be enforceable, and as being "not in accordance with the law" (R. 18, 23); and that the proposed rent reduction orders are unconstitutional and void as a violation of the Fifth Amendment, as involving an improper delegation of judicial power, and as involving an improper subdelegation of power (R. 25).

The opinion of the district court in the case of *Payne v. Griffin*, *supra*, incorporated into the record of this case as the basis for the order of September 1, 1943, dismissing the complaint herein (R. 26-38), did not embrace all of the issues raised by the defendants below in this case. *Payne v. Griffin* was a tenant's action for statutory damages pursuant to Section 205 (e) of the Act, in which the Administrator intervened. The opinion held the rent provisions of the Act (Sec. 2 (b)) unconstitutional on the ground of improper delegation of legislative power (R. 31-38). The reasoning of the opinion in this regard, insofar as it refers to questions of notice and hearing, suggests that the court may also have intended to

⁷ This allegation appears in the prayer of the amendment to the answer.

hold the review provisions of the Act (Sects. 203, 204) unconstitutional for failure to afford due process (R. 36-37). Finally, the opinion held that Section 204 (d) of the Act could not validly confine to the Emergency Court of Appeals a challenge to the validity of the statute and, derivatively, of the regulation (R. 26-31). The decision on the latter point in *Payne v. Griffin* was addressed to a construction of Section 204 (d) advanced by the tenant, with which the Administrator, as intervener, was not in agreement. The tenant had urged that Section 204 (d) barred the landlord's defensive attack on the constitutionality of the Act. The Administrator conceded (and the Government has always taken the position) that the statute, as distinct from the Regulation, is open to attack in such a suit. Thus, the issue of delegation of power, which the court below treated as decisive, was concededly open to adjudication. Accordingly, the materiality in the present case of the district court's ruling in *Payne v. Griffin* with respect to Section 204 (d) seems doubtful. Also, the Administrator moved for an amendment of the order of September 1, 1943, to take cognizance of the fact that the present action involved an aspect of Section 204 (d) not present in *Payne v. Griffin*; namely, the provision whereby State courts (together with Federal courts except the Emergency Court of Appeals) are prohibited from assuming jurisdiction of a

suit to restrain or set aside the rent regulations or the rent provisions of the Act or to restrain the enforcement thereof (R. 38-40). The district court, acting upon the motion, amended its order of September 1, 1943, by adding thereto a statement to the effect that the court does not deem it necessary to decide and does not decide whether Section 204 (d) of the Act is unconstitutional insofar as it may operate to restrict the jurisdiction of the Superior Court of Bibb County, Georgia, in the suit brought by defendant Willingham against the Rent Director (R. 39).

This appeal followed.

SUMMARY OF ARGUMENT

I

The rent control provisions of the Act do not unlawfully delegate legislative power to the Administrator. It would manifestly have been impractical for Congress to have undertaken the specific control of maximum rents for housing accommodations throughout the country. The policies and standards laid down bring the Act well within the limits of permissible delegation. The rents fixed must not only be generally fair and equitable and effectuate the purposes of the Act, but in addition they are to be established in the light of rents actually prevailing in an area as of the focal date April 1, 1941. In no event may the Administrator employ a base date

earlier than April 1, 1940. The Administrator must make adjustments for relevant factors of general applicability, including changes in property taxes and other costs.

While it is not essential that the statute require findings in advance of the issuance of a regulation, Section 2 (b) of the Act requires that a rent declaration shall set forth the necessity for the stabilization or reduction of rents for defense area housing accommodations within a particular defense rental area. In fact, the Administrator made findings both in the rent declaration and in the maximum rent regulation itself. Also, in denying a protest against a regulation, the Administrator is required to state the grounds of his decision and the economic data and other facts of which he has taken official notice.

There is no constitutional requirement of advance hearings in order that a delegation of power may be sustained. The question of notice and hearing relates rather to the issue of procedural due process.

II

The requirements of procedural due process are satisfied. Section 204 (d) of the Act forbids challenges to regulations in any court except the Emergency Court of Appeals, but it does not preclude a defense based on the invalidity of the statute itself. Since the issue of delegation of power was held decisive by the court below, the

limitation in Section 204 (d) did not come into operation. Section 204 (d) also withdraws from the state courts, and from federal courts other than the Emergency Court of Appeals, jurisdiction to enjoin the enforcement of the Act or regulations thereunder; the validity of the withdrawal of jurisdiction from the state courts was expressly pretermitted by the court below. In any event, it is beyond challenge that Congress has power under Article III to confer upon a federal court exclusive jurisdiction of cases arising under the Constitution or laws of the United States. *Tennessee v. Davis*, 100 U. S. 257; *Venner v. Michigan Central Railroad Company*, 271 U. S. 127. See *Kittrell v. Hatter*, 10 So. (2d) 827 (Ala. 1942).

The opinion below suggests that there is no adequate requirement in the statute of notice and hearing. With respect to the projected rent reduction order here involved, this objection has no pertinence, since Procedural Regulation No. 3 requires notice to the landlord, and the latter was in fact given notice and an opportunity to present objections. There are, moreover, detailed provisions for review of the Rent Director's action. With respect to the basic rent regulation itself, there is no constitutional requirement that its issuance be preceded by notice and hearing. Cf. *Bi-Metallic Co. v. Colorado*, 239 U. S. 441, 445. It is a general regulation addressed to large numbers

of persons and prescribing standards for the future. It is comparable to regulations prescribing medical and occupational standards under the Selective Service law. It was thought by Congress to be particularly necessary that regulations under the present Act should not await the holding of formal hearings, lest an opportunity for hearings become an opportunity for price rises and speculative disturbances. Comprehensive provisions for hearing in connection with protests after the issuance of a basic regulation are contained in the statute and the applicable procedural regulations. This procedure was not availed of by the appellee landlord.

III

The present suit by the Administrator is not barred by Section 265 of the Judicial Code. This question was not passed on below. Numerous federal courts have held that the Administrator is not prohibited from enjoining the further prosecution of eviction suits brought by landlords in the state courts. Those decisions are sound and are applicable here. The legislative policy expressed in Section 265 must be considered in conjunction with the provisions of the Price Control Act, particularly those provisions giving the Administrator power to bring injunction suits to enforce compliance, and those withdrawing from

all courts, including state courts, other than the Emergency Court of Appeals, jurisdiction to restrain the enforcement of the Act or regulations thereunder.

The present suit by the Administrator seeks to compel compliance on the part of a landlord who has attempted to set at naught the provisions of the applicable rent regulation. The landlord has maintained rentals in excess of those about to be prescribed by the Rent Director, and has done so during the pendency of a challenge to the Rent Director's authority, whereas the Act demands that rent and price orders be obeyed during the progress of litigation challenging them. An effective order of compliance pursuant to Section 205 (a) of the Act must include a provision directing the landlord to abandon the state court suit and thus permit the administrative action to be completed.

Furthermore, the express withdrawal of jurisdiction from the state courts by Section 204 (d) makes inapplicable the rule of comity laid down by Section 265 of the Judicial Code. The case is therefore like those discussed in *Toucey v. New York Life Insurance Co.*, 314 U. S. 118, 132-134, in which Congressional legislation has been deemed to qualify Section 265.

ARGUMENT**I.****THE RENT CONTROL PROVISIONS OF THE ACT DO NOT UNLAWFULLY DELEGATE LEGISLATIVE POWER TO THE ADMINISTRATOR**

The court below characterized the rent control provisions of the Act as a delegation to the executive branch "to determine what the law shall be" (R. 31). Fixing attention on the provision directing the Administrator to establish maximum rents at "generally fair and equitable" levels, the court held that the authority is vitiated by the asserted failure of the Act to require administrative hearings in advance of the issuance of rent regulations and, upon such issuance, to make accompanying findings (R. 32-38). The decision below would add a third statute to the number of those heretofore held invalid on the ground of delegation of power. *Panama Refining Co. v. Ryan*, 293 U. S. 388; *Schechter Poultry Corp. v. United States*, 295 U. S. 495. The decision would for the first time in our history set aside a delegation of authority to an independent administrative agency. In rendering so grave a decision the court below, it is respectfully submitted, failed to give due significance to the decisions of this Court, to the provisions of the Act itself, and to the administrative action taken thereunder.

A precise formulation of the outer limits of lawful delegation is unnecessary to this case. The degree of detail with which Congress is obliged to describe its policies and standards must, of course, vary with the character of the subject of regulation. The proper bounds of delegability "must be fixed according to common sense and the inherent necessities of the governmental co-ordination" (*Hampton & Co. v. United States*, 276 U. S. 394, 406). This is preeminently so when "dealing with legislation involving questions of economic adjustment." *United States v. Rock Royal Co-op.*, 307 U. S. 533, 574. "The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable." *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 145; cf. *Butfield v. Stranahan*, 192 U. S. 470.

The present Act is safely within the permitted limits. We have here the kind of situation, like rate making, price fixing, and setting of wage rates, where delegation by Congress has become traditional. In undertaking to aid in the prevention of wartime inflation through the control of rents as part of a general price and rent control program, the task must be done for a large and populous country, with many congested population centers, each with its shifting and local problems. Plainly this is the type of function which demands consideration of, and accommoda-

tion to, complex economic factors. It is impracticable for Congress itself to undertake these functions in all-embracing and definitive legislation. Congress may appropriately, therefore, set the policies and standards, and leave implementation and execution to the agency charged with administration. Cf. *Buttfield v. Stranahan*, 192 U. S. 470, 496; *Union Bridge Co. v. United States*, 204 U. S. 364, 386.

We turn to the specific provisions of the Act itself. In no sense can they be said to authorize the Administrator to exercise an uncontrolled discretion in fixing rent levels. Section 2 (b) not only requires that the rents fixed be "generally fair and equitable," and "effectuate the purposes of this Act," but in addition, in contrast to the usual provisions governing rate making, price fixing, and wage determinations, which contain the familiar requirements of fairness, equity, or reasonableness, there is here a sharp limitation in terms of time, that is, in terms of rents actually prevailing as of a given date. The Act designates April 1, 1941, as the date by which the Administrator is ordinarily to be guided in fixing rent levels. This base date may vary, under the Act, if "defense activities" have caused or threatened to cause increases calling for a different base date. In no event, however, may the Administrator employ a base date earlier than April 1, 1940. There is thus an absolute limit on the Adminis-

trator's discretion in selecting base dates which go back to a preinflationary period. And here, in fact, the base date adopted by the Administrator in issuing the instant regulation is April 1, 1941, the focal date prescribed in the Act.

In establishing base period rents, the Administrator must also make "adjustments" for "relevant factors" which he determines to be "of general applicability," including changes in property taxes and other "costs." And the Administrator must give consideration to the recommendations of state and local officials (Sec. 2 (b)).

It is submitted that the standards governing determination of rent levels under the present Act—the provision that rents shall be "generally

* It would have been wholly impracticable for Congress to attempt to establish rigid rules specifying in advance the weight to be given to each factor which the Administrator considers in fixing maximum rents, or to enumerate all the "relevant factors" which the Administrator is to consider in adjusting base dates. *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 145-146. The "relevant factors" which Congress necessarily declined to restrict by enumerating them in greater detail derive meaning from the clearly expressed statutory objectives. Cf. *Pittsburgh Plate Glass Co. v. Nat'l Labor Relations Board*, 313 U. S. 146, 165-166. The relative importance of any of these factors in a particular instance can be determined only on the basis of a study of the varying facts in each case. Other statutes upheld by this Court have provided for precisely this type of flexibility of administration. *Opp Cotton Mills v. Administrator*, *supra*; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381; *United States v. Rock Royal Co-op.*, 307 U. S. 533; *Mulford v. Smith*, 307 U. S. 38.

fair and equitable" and the companion provisions described above—are wholly adequate. They have been stated with precision in the Act. Indeed a far broader delegation would scarcely have been improper in view of the need for administrative flexibility in carrying out a statutory plan of the type embodied in the rent provisions of this Act. The present standards are more specific and detailed than those contained in numerous other statutes which have been approved by this Court.*

* *United States v. Rock Royal Co-op*, 307 U. S. 533, involved a delegation of authority to the Secretary of Agriculture authorizing him to set minimum milk prices based on parity, but adjustable if parity is found to be unreasonable in view of prices of food and in view of economic conditions affecting supply and demand. (7 U. S. C. sec. 608c (18).) *Opp Cotton Mills v. Administrator*, 312 U. S. 126, involved a delegation of authority providing that the Administrator of the Fair Labor Standards Act and the Industry Committees established thereunder should set for various classifications within the industry the highest minimum wage effectuating the purpose of the Act—the statutory goal of 40 cents per hour—which "(1) will not substantially curtail employment * * * and (2) will not give a competitive advantage to any group in the industry * * *" (29 U. S. C. 208 (c), 208 (d)). In *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, the Court upheld the Bituminous Coal Act of 1937, providing for maximum coal prices which reflect a reasonable return on the fair value of the property, and for minimum prices which are governed by standards requiring computation of the weighted average cost for each minimum price area and classification of coal on a basis which is just and equitable to producers and gives due regard to the interest of the consuming public. (15 U. S. C. sec. 833 (a).) Compare also *Mulford v. Smith*, 307 U. S. 38; *Currin v. Wallace*, 306 U. S. 1. Compare also the standards upheld in the following decisions: *New York Central Securities Co. v. United States*,

And they have been approved with impressive accord by numerous federal and state courts.¹⁰ Moreover, the Administrator's decision as to what

287 U. S. 12 ("in the public interest"); *Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266 ("Public convenience, interest, or necessity"); *United States v. Chemical Foundation*, 272 U. S. 1 ("in the public interest"); *Colorado v. United States*, 271 U. S. 153, and *Ches. & Ohio Ry. v. United States*, 283 U. S. 35 ("certificates of public convenience and necessity"); *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420 ("just and reasonable" commissions); *Buttfield v. Stranahan*, 192 U. S. 470 ("purity, quality, and fitness for consumption"); *Union Bridge Co. v. United States*, 204 U. S. 364, and *Monongahela Bridge v. United States*, 216 U. S. 177 ("unreasonable obstruction to navigation"); *Mahler v. Eby*, 264 U. S. 32 ("undesirable resident").

¹⁰ The delegation of power to control rents has been upheld in the following cases: *Taylor v. Brown*, 137 F. (2d) 654 (E. C. A. 1943), cert. denied, No. 305, 1943 Term; *Brown v. Wright*, 137 F. (2d) 484 (C. C. A. 4th, 1943); *Henderson v. Kimmel*, 47 F. Supp. 635 (D. Kan. 1942); *Brown v. Wick*, 48 F. Supp. 887 (E. D. Mich. 1943); *Brown v. Warner Holding Co.*, 50 F. Supp. 593 (D. Minn. 1943); *Bias v. Sankey* (Brown, Intervenor), decided March 29, 1943, N. D. Ill., not yet reported; *United States v. Erlich*, decided April 13, 1943, S. D. Fla., not yet reported; *Brown v. Winter*, 50 F. Supp. 804 (W. D. Wis. 1943); *Brown v. Douglass*, N. D. Tex. July 17, 1943, OPA Serv. 622:228; *Pratt v. Hollenbeck*, Ct. of Com. Pleas, Erie County, Pa., April 22, 1943, OPA Serv. 622:109; *Home Protective Savings & Loan Ass'n v. Robinson*, Ct. of Com. Pleas, Beaver County, Pa., May 11, 1943, OPA Serv. 622:122; *Murphy v. Milner Hotels*, Ct. of Common Pleas, Tulsa County, Okla., OPA Serv. 622:271. The single decision to the contrary, *Roach v. Johnson*, 48 F. Supp. 633 (N. D. Ind. 1943), was vacated by this Court, 319 U. S. 202.

The price control provisions of the Act have similarly been sustained in numerous cases as against an attack based on delegation of power: *Rottenberg v. United States*, 137 F. (2d) 850 (C. C. A. 1st, 1943), pending on certiorari No. 375, present

rents are "generally fair and equitable" is subject to judicial scrutiny in the exclusive statutory forum (Section 204).

Administrative findings and the issue of delegation.—The relevancy of the presence or absence of findings to the issue of delegation is dubious at best.¹¹ The question is more properly one going to

Term; *United States v. C. Thomas Stores*, 49 F. Supp. 111 (D. Minn. 1943); *United States v. Slobodkin*, 48 F. Supp. 913 (D. Mass. 1943); *United States v. Hark*, 49 F. Supp. 95 (D. Mass. 1943), pending on appeal, No. 83, present term; *United States v. Charney*, 50 F. Supp. 581 (D. Mass. 1942); *United States v. Sosnowitz*, 50 F. Supp. 586 (D. Conn. 1943); *United States v. Friedman*, 50 F. Supp. 584 (D. Conn. 1943); *Brown v. Ayello*, 50 F. Supp. 391 (N. D. Cal. 1943); *United States v. Kripnick*, 51 F. Supp. 982 (D. N. J. 1943); *United States v. Fitzsimmons Stores, Ltd.*, S. D. Cal., 1943, OPA Service 620: 210; *Brown v. Liniavski* (S. D. N. Y.), decided Dec. 13, 1943, not yet reported; *Brown v. W. T. Grant Co.* (S. D. N. Y.), decided Dec. 14, 1943, not yet reported; *Miller v. Municipal Court*, S. Ct. Calif., Sept. 30, 1943, OPA Service 620: 231.

¹¹ Whether there are findings would not seem to be determinative of the question whether a statute embodies sufficient standards to keep it within the constitutional bounds of Article 1, Section 1. There is language to the contrary in *Wichita Railroad & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 59, and in *Panama Refining Co. v. Ryan*, 293 U. S. 388, 431-432. Neither case is persuasive here. The former involved a rate order directed to an individual company; the precise question was whether a rate order unaccompanied by findings was valid under a statute which required, as a condition precedent to orders changing rates, a finding that existing rates are unjust, unreasonable, discriminatory, or preferential. Wholly apart from any question of delegation, therefore, it is apparent that the absence of required findings vitiated the order. In the *Panama Refining* case, the Court seems to have held the order

the validity of an order or regulation unaccompanied by findings. This question, of course, is reserved for the Emergency Court of Appeals under Section 204 of the Act. In any event, we are aware of no principle which conditions a statute's validity upon an express requirement that findings be made. Indeed, the contrary is implicit in the holdings of this Court. This Court has treated the issue of findings as a statutory question—whether, if the statute requires findings, that requirement has properly been fulfilled. If the statutory requirement has not been met, the order has been held invalid. E. g., *United States v. Baltimore & Ohio R. Co.*, 293 U. S. 454; *Mahler v. Eby*, 264 U. S. 32. And the Court has sustained the constitutionality of statutes which made no provision for findings and where no finding was made. E. g., *Martin v. Mott*, 12 Wheat. 19; *United States v. Grimaud*, 220 U. S. 506. Cf. *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 185-186; *Thompson v. Consolidated Gas Co.*, 300 U. S. 55, 69.¹²

under consideration invalid on two independent grounds: (1) the absence of standards; and (2) the absence of findings. The two issues were treated separately. While it is true that in the course of discussion of the second issue, the Court used language relating findings to delegation, there is no explicit formulation of such a doctrine. See Gellhorn, *Administrative Law—Cases and Comments* (1940), p. 783, note 2.

¹² In *Opp Cotton Mills v. Administrator*, 312 U. S. 126, this Court stated (p. 144):

“ * * * But where, as in the present case, the standards set up for the guidance of the administrative agency, the

Section 2 (b) of the present Act provides that the Administrator's Rent Declaration must set forth "the necessity for * * * the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area".¹³ Thus, there is an express requirement that findings accompany the step which initiates action. While it is true that the Act does not expressly duplicate this requirement in respect of the maximum rent regulation itself, it is nevertheless true that, if such a statutory requirement were necessary to the validity of the Act, which it is not, it may be supplied by implication. For while a statute may be invalid because it may require something to be done which is forbidden by the Constitution, "it cannot be essential to the validity of a statute that it should enjoin obedience to the Constitution." *Railroad Commissioners v. Columbia, N. & L. R. Co.*, 82 S. C. 418, 423, 64 S. E. 240, 242 (1909). Cf. *Toombs v. Citizens' Bank*, 281 U. S. 643; *Paulsen v. Portland*, 149 U. S. 30; *The Japanese Immigrant Case*, 189 U. S. 86.

procedure which it is directed to follow and the record of its action which is required by the statute to be kept or which is in fact preserved, are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function." [Italics added.]

¹³ The findings thus required are analogous to the "statement of the considerations" which must accompany price regulations under Section 2 (a) of the Act.

In point of fact the Administrator here made express findings in his Rent Declaration and in the Maximum Rent Regulation (Rent Reg., *infra*). It will be noted that subsidiary facts are set forth in the initial Declaration both as to the need for rent control in the area and as to the selection of April 1, 1941, as the base date. It should be further observed that as a preliminary to judicial review of a regulation under Section 204 of the Act, administrative proceedings will have been had under Section 203, and in such proceedings the Administrator's denial of a protest against the Regulation must be accompanied by a statement of the grounds upon which his decision is based and the economic data and other facts of which he has taken official notice.

In these circumstances, even assuming that an express requirement of findings were necessary to the constitutional validity of a statute, appellee Willingham is precluded on familiar grounds from making her attack. She has no standing to complain, inasmuch as she is not injured by the asserted statutory omission of a requirement of findings. As this Court has stated, a person who has actually received notice cannot complain of a statute's failure to specify that notice be given. "Other persons * * * whose rights might be injuriously affected by the decision, might lawfully complain of the unconstitutionality of an act which would deprive them of their

property without notice; but it is difficult to see how the petitioner would be affected by it." *Tyler v. Judges of Court of Registration*, 179 U. S. 405, 410. Cf. *Corporation Commission v. Lowe*, 281 U. S. 431; *Hatch v. Reardon*, 204 U. S. 152; *Hirabayashi v. United States*, 320 U. S. 81. And again, any attack upon the particular regulation on the ground that it was not accompanied by proper findings is remitted by Section 204 (d) of the Act to a forum other than the court below.

Administrative hearings and the issue of delegation.—Whether a hearing must precede the issuance of a Maximum Rent Regulation is a question of due process. See pp. 32-36, *infra*. The falacious notion that hearings in advance of discretionary administrative action are an element in proper delegation of legislative authority arises out of a mistaken application of language appearing in *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 539, 540. The Court in that case referred to such hearings not as an integral feature of every delegation of authority which leaves some discretion in the hands of the executive, but simply as an aid in giving content and meaning to the undefined phrase "unfair competitive practices" appearing in the statute involved in that case. The Court referred to other statutes containing similar phraseology where the objection of vagueness was obviated by

means of hearings in which the statutory language received a more concrete formulation. There is no comparable question under the present Act, since, as we have seen, the statutory objectives and standards are stated with ample detail and precision.¹⁴

II

THE REQUIREMENTS OF PROCEDURAL DUE PROCESS ARE SATISFIED

Such issues of procedural due process as the present case may involve are somewhat uncertainly drawn on this appeal.

1. The application of Section 204 (d) to this suit by the Administrator is not properly drawn in question by the decision below. The Government has taken the position that Section 204 (d), in forbidding attacks upon regulations in any court save the Emergency Court of Appeals, does not preclude an attack on the statute itself. This

¹⁴ There is no hearing provision for dissatisfied parties in either the Tobacco Inspection Act upheld in *Curry v. Wallace*, *supra*, or the tobacco marketing quota provisions of the Agricultural Adjustment Act upheld in *Mulford v. Smith*, *supra*. A referendum is required in each instance before the Secretary's order becomes operative, but the disapproving minority have no opportunity to present their views before the administrative officer. But even assuming that an advance hearing is ordinarily required, the postponement of such hearing until after a regulation is effective would be justified here by the extraordinary circumstances which gave rise to the Emergency Price Control Act and by the necessity for eliminating delays in putting the regulations into effect. See pp. 34-35, *infra*.

position is supported by the language of the section and by its legislative history.¹⁵ The constitutional question of delegation of power was thus within the permissible scope of the district court's inquiry, and since that question was found to be decisive, the limitations of Section 204 (d) did not come into operation. The question of their application to prevent an attack on particular regulations, in enforcement proceedings brought by the Government, is before the Court in the *Yakus* and *Rottenberg* cases, Nos. 374 and 375.

¹⁵ The Senate Committee on Banking and Currency, in favorably reporting the bill which contained the provisions of Section 204 (d), stated (S. Rep. 931, 77th Cong., 2d sess., pp. 24-25) :

"Section 204 (d) further provides expressly that no court, other than the Emergency Court and the Supreme Court, shall have jurisdiction or power to consider the validity, constitutional or otherwise, of any regulation or order issued under section 2. It also provides that no court, except as provided in section 204, shall have jurisdiction or power to stay, restrain, enjoin, or set aside (whether by declaratory judgment or otherwise) any provision of the bill authorizing the issuance of such regulation or order, or to restrain or enjoin the enforcement of any provision of any such regulation or order. Thus the bill provides for exclusive jurisdiction in the Emergency Court and in the Supreme Court to determine the validity of regulations or orders issued under section 2. *Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself.*" [Italics supplied.]

The bill thus reported to the Senate, whose pertinent provisions were adopted, differed significantly from the bill as

2. The application of Section 204 (d) in withdrawing from state courts (and federal courts other than the Emergency Court of Appeals) jurisdiction to enjoin the enforcement of the Act or regulations thereunder, presented a question which was expressly pretermitted by the court below (R. 39). Should the question be pressed and considered here, it is enough to say that the power of Congress under Article III of the Constitution to grant jurisdiction over cases arising under the Constitution or laws of the United States to a federal tribunal, to the exclusion of state courts, is beyond challenge. *Tennessee v. Davis*, 100 U. S. 257; see *Kittrell v. Hatter*, 10 So. (2d) 827 (Ala. 1942). Indeed, the power of Congress has additional support in the situation here presented, since the state court proceeding is in substance a suit against the United States to restrain the performance of official duties even before the completion of the administrative process. In *Venner v. Michigan Central Railroad Company*, 271 U. S. 127, the Court gave effect to the denial of jurisdiction to the state courts to set aside an

introduced in the House; in its original form Section 204 (d) provided: "The Emergency Court of Appeals, and the Supreme Court upon review of judgments of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any ceiling regulation or order, *and of the provisions of this Act authorizing such regulation or order.*" [Italics supplied.] H. R. 5479, 77th Cong. 1st sess., printed in Hearings before Committee on Banking and Currency, House of Rep., 77th Cong. 1st sess., on H. R. 5479, pp. 4, 7-8.

order of the Interstate Commerce Commission. See also *Lambert Run Coal Company v. Baltimore & Ohio Railroad Company*, 258 U. S. 377. The same result is, of course, familiar in the case of suits to enjoin orders of many other federal administrative agencies.

3. There remain the issues concerning notice and hearing suggested by the observations of the district court in its discussion of the question of delegation of power (R. 37-38). Here again some further analysis of the issues in their present setting is necessary. No question could be raised concerning a requirement of notice and hearing prior to the issuance of the projected rent reduction order here involved, for Revised Procedural Regulation No. 3 provided (Section 1300.207) that before entering an order on his own initiative the Rent Director shall serve a notice upon the landlord stating the proposed action and the grounds therefor; the same procedure is required (Section 1300.205) in the case of applications by tenants for rent reduction orders. It is not disputed that such notice was given in the present case. Indeed, the notice, with its accompanying invitation to the landlord to present objections, unwittingly provided the opportunity for bringing the suit in the state court against the Rent Director. In addition, there are detailed provisions for review of the Rent Director's action (Sections 1300.209-1300.210). Applications for review may be filed with the Rent Director for forwarding to the

Regional Administrator; the Regional Administrator may affirm, revoke, or modify in whole or in part the determination of the Rent Director. From the Regional Administrator's action, the landlord may pursue his appeal by way of protest to the Price Administrator (Section 1300.215). In the alternative, a landlord may, instead of seeking review by the Regional Administrator, file a protest directly with the Price Administrator to set aside or modify an order of the Rent Director (Sections 1300.209, 1300.215). The adequacy of the procedure thus afforded is plain; at the very least, its application cannot be assailed in the abstract, at the behest of a person who has shunned it. Cf. *Anniston Manufacturing Company v. Davis*, 301 U. S. 337, 354-355; *Hall v. Geiger-Jones Company*, 242 U. S. 539, 554; *Plymouth Coal Company v. Pennsylvania*, 232 U. S. 531, 542, 544-545.

Since an opportunity was in fact provided to file objections to the rent reduction order both prior to its issuance and subsequent thereto, any challenge on the score of procedural due process must be addressed to the issuance of the basic maximum rent regulation itself. It cannot be contended that the statute is unconstitutional because it does not in terms require a hearing in advance of the issuance of the basic regulation. A statute is nonetheless valid where it fails to require notice, if notice is not in fact precluded by the statute. *Toombs v. Citizen Bank*, 281 U. S.

643; *Bratton v. Chandler*, 260 U. S. 110; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 334. The issue is thus narrowed to the question whether due process of law requires that a hearing be afforded in fact prior to the issuance of a basic rent regulation. Such regulations operate prospectively; they establish a general rule for the conduct of many persons, not a rule of decision in a particular case. To the extent that the administrative process may partake of the quality of legislative or of judicial action, the issuance of a rent regulation belongs in the former category. Of such regulations this Court has said, speaking through Mr. Justice Holmes in *Bi-Metallic Co. v. Colorado*, 239 U. S. 441, 445:

Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.¹⁶

¹⁶ To the same effect are *Highland Farms Dairy v. Agnew*, 16 F. Supp. 575 (E. D. Va. 1936), aff'd, 300 U. S. 608; *State ex rel. State Board of Milk Control v. Newark Milk Co.*, 118

It was not supposed that the presidential order reducing the gold content of the dollar, within limits fixed by Congress, was invalid because of the absence of hearings. Cf. *Norman v. Baltimore & Ohio Railroad Company*, 294 U. S. 240. And it has not been suggested that regulations under the Selective Service law, which prescribe occupational and medical standards applicable generally to registrants, are invalid because not preceded by hearings.

The exigencies of the Price Control Act as an essential wartime measure were regarded by Congress as precluding the holding of formal hearings before the issuance of price or rent regulations.¹⁷

N. J. Eq. 504, 179 Atl. 116 (1935); *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 Pac. 595 (1920). Compare the following cases involving import tariff matters, where approval of tariff schedules adopted without prior hearing rests upon the twofold basis of the plenary authority of Congress to deal with the subject matter and the doctrine enunciated in the *Bi-Metallic Co.* case, *supra*: *United States v. Bush & Co.*, 310 U. S. 371; *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294; *Buttfield v. Stranahan*, 192 U. S. 470. Compare also the following cases in which the omission of special findings in support of administrative action was approved on the ground of the quasi-legislative character of the proceedings: *Pacific States Box & Basket Co. v. White*, 296 U. S. 176; *American Telephone & Telegraph Co. v. United States*, 14 F. Supp. 121 (S. D. N. Y. 1936), aff'd, 299 U. S. 232.

¹⁷ The provisions of the bill reported by the House Banking and Currency Committee were virtually identical in this respect with the provisions of the Act. See H. Rept. No. 1409, 77th Cong., 1st sess. (1941), pp. 10-12; H. R. 5990, 77th Cong. 1st sess. (1941). See also Sen. Comm. Print, Hear-

Congress did, however, provide in Sections 203 and 204 of the Act a comprehensive procedure for the adjustment and review of maximum rent regulations and orders issued under the Act. The statutory review procedure is reflected in cases which have reached this Court. *Davies Warehouse Company v. Brown*, 137 F. (2d) 201 (E. C. A.), pending on certiorari, No. 112, present Term; *Taylor v. Brown*, 137 F. (2d) 654 (E. C. A.), certiorari denied, No. 305, present Term. We shall not undertake to discuss here the adequacy of the protest and review procedure available to challenge a basic regulation. That procedure was not availed of in the present case; in any event, its operations are more fully

ings before Sen. Committee on Banking and Currency on H. R. 5990, 77th Cong., 1st sess. (1941), pp. 72-105. The first bill passed by the House authorized the issuance of price regulations by the Administrator without prior hearing, followed by opportunity for full hearing before an administrative Board of Review while the regulations remained in effect. H. R. 5990 (in the Senate), 77th Cong., 1st sess. (1941). The Senate rejected this. A proposal by Senator Taft to require hearings prior to the issuance of price regulations but authorizing temporary regulations without prior hearings to remain in effect for not more than sixty days was never brought to a vote. See 88 Cong. Rec. 7.

See H. Rept. 1409, *supra*, pp. 9-10: "The procedure governing the preparation and issuance of substantive regulations and orders prescribing ceilings or regulating practices has necessarily been adapted to the nature of the powers granted, which involves a broad delegation of legislative power, to the fact that such regulations will apply to large numbers of persons, and to practical considerations, such as the necessity for immediate action to check rapidly rising prices and the importance of avoiding speculative disturbances of the market pending the determination of a price ceiling."

discussed in the Government's brief in the *Rottenberg* and *Yakus* cases, Nos. 374 and 375, present Term.

III

SECTION 265 OF THE JUDICIAL CODE IS NOT A BAR TO THE ADMINISTRATOR'S SUIT

Although not passed on below, and not involving the jurisdiction of the district court in the strict sense (*Smith v. Apple*, 264 U. S. 274, 278-280), the question whether the present suit is affected by Section 265 of the Judicial Code is doubtless open on this appeal under the Act of August 24, 1937. Cf. *United States v. Rock Royal Co-op.*, 307 U. S. 533, 541, 568-571.

The same question has been raised in a number of cases in which the Administrator has brought injunction proceedings to restrain landlords from further prosecuting eviction suits in the state courts. Without exception Section 265 has been held not to be a bar. The decisions have been rendered by two circuit courts of appeals,¹⁸ including that for the Fifth Circuit, in which the present suit arises, by a three-judge district court,¹⁹ and by several other district courts.²⁰

¹⁸ *Brown v. Wright*, 137 F. (2d) 484 (C. C. A. 4th, 1943); *Henderson v. Fleckinger*, 136 F. (2d) 381 (C. C. A. 5th, 1943).

¹⁹ *Henderson v. Kimmel*, 47 F. Supp. 635 (D. Kan. 1942).

²⁰ *Brown v. Wilson*, W. D. Wash., Feb. 18, 1943, OPA Serv. 622: 81; *Brown v. Wick*, 48 F. Supp. 887 (E. D. Mich. 1943); *Brown v. Wood*, N. D. Cal., Mar. 18, 1943, OPA Ser. 622: 103; *Brown v. Lee*, S. D. Cal., March 23, 1943, OPA Service 622: 98.

These decisions are, we submit, entirely sound. The policy expressed in Section 265 must be read together with the provisions of the Emergency Price Control Act; in particular, it must be read in connection with the express power conferred on the Administrator to enforce compliance with the Act by injunction proceedings, and the provisions withdrawing from all courts (including state courts) except the Emergency Court of Appeals jurisdiction to restrain the enforcement of the Act or regulations thereunder. Thus viewed, the declaration in Section 265 is overborne by the procedural authority and jurisdictional limitations provided in the present Act.

First.—The Administrator's suit was brought to enforce compliance with the Act upon a showing of violations or threatened violations. The landlord's action in the state court was part of a plan to escape compliance with the Act; it was not merely a proceeding for an adjudication, but was a constituent part of a plan for violation of the price control law. By the same token, it cannot be said of the Administrator's suit, as it was said in *Oklahoma Packing Company v. Oklahoma Gas and Electric Company*, 309 U. S. 4, 8, that "the only thing sought to be accomplished by this equitable action is to stay the continuance of that [state court] action."

The landlord's plan of violation of the Act did not rest simply on the choice of an improper forum. More important, it rested on the con-

tinuance of rental charges when the rent director was about to adjust them downward, and the continuance of those charges during the pendency of a challenge to the proposed order. The statute itself commands obedience to rent or price orders during the process of administrative and judicial review. Sections 203 (a), 204 (e), 204 (d). The rent regulation itself provided for orders of adjustment in the case of property rented, as was appellee's, subsequent to April 1, 1941, the base date. Section 1388.1704 (e); 1388.1705 (e). Revised Procedural Regulation No. 3 provided that such an order would be issued only after serving notice upon the landlord stating the proposed action and the grounds therefor. Section 1300.207. These provisions the landlord has attempted to set at naught, while continuing to charge rents which, but for the state court suit, would have been formally reduced by administrative order. The obvious purpose and effect of the institution of the state court suit has been to keep excessive rentals in force during the period in which the Act and the regulations contemplated that they should have been reduced. In these circumstances the Administrator was plainly empowered by Section 205 (a) of the Act to bring the present suit to enforce compliance. Compliance requires abandonment of the state court proceedings as well as obedience to the projected adjustment order.

That Section 265 is not a bar to suits brought to enforce compliance with federal law has been

recognized in a number of decisions. *National Labor Relations Board v. Sunshine Mining Co.*, 125 F. (2d) 757 (C. C. A. 9th, 1942); *Western Fruit Growers v. United States*, 124 F. (2d) 381 (C. C. A. 9th, 1941); *Miller v. Climax Molybdenum Co.*, 96 F. (2d) 254 (C. C. A. 10th, 1938); *In re Securities and Exchange Commission*, 48 F. Supp. 716 (D. Del. 1943); *Katz Drug Co. v. W. A. Sheaffer Pen Co.*, 6 F. Supp. 212 (W. D. Mo. 1933); *Good Coal Co. v. National Labor Relations Board*, 6 L. R. R. 323 (C. C. A. 6th). Cf. *Sanders v. Oklahoma City*, 19 F. Supp. 50 (W. D. Okla., 1937), aff'd, 94 F. (2d) 323 (C. C. A. 10th, 1938). Likewise, injunctions have been granted against interference with property interests of the United States through state court proceedings. *United States v. Phillips*, 33 F. Supp. 261 (N. D. Okla., 1940), decree vacated on other grounds, 312 U. S. 246; *United States v. McIntosh*, 57 F. (2d) 573 (E. D. Va. 1932), 2 F. Supp. 244 (E. D. Va. 1932), rehearing denied, 3 F. Supp. 715 (E. D. Va. 1933), appeal dismissed, 70 F. (2d) 507 (C. C. A. 4th, 1934); *United States v. Babcock*, 6 F. (2d) 160 (D. Ind. 1925), reversed for modification of decree, 9 F. (2d) 905 (C. C. A. 7th, 1925). Cf. *United States v. Inaba*, 291 Fed. 416 (E. D. Wash. 1923).

Second.—The exclusive jurisdiction provision in Section 204 (d) of the Act, withdrawing from all courts save the Emergency Court of Appeals jurisdiction to enjoin the enforcement of the Act or regulations thereunder, furnishes additional

ground for the inapplicability of Section 265. Section 265 was designed to prevent needless friction "between two systems of courts having potential jurisdiction over the same subject-matter." *Hale v. Bimco Trading, Inc.*, 306 U. S. 375, 378. It declares a rule of comity between courts of "concurrent" or "coordinate" jurisdiction. *Kline v. Burke Construction Company*, 260 U. S. 226, 229. Here, however, Congress itself has abrogated the rule of comity, in the interest of the uniform effectiveness of a vital wartime measure. Congress itself has derogated from the ordinary independence of state courts by channeling injunctive attacks against the Price Control Act in a single federal tribunal, with review in this Court.

The present case is therefore essentially like those discussed in *Toucey v. New York, Life Insurance Co.*, 314 U. S. 118, 132-134, in which congressional legislation has been deemed to qualify Section 265. Some of these enactments, like the Removal Acts and the statute limiting the liability of shipowners, did not in terms authorize injunctions against state court proceedings. Nevertheless, the congressional mandate withdrawing jurisdiction from the state courts upon the removal of an action or upon the transfer of a shipowner's interest for the benefit of claimants has properly been held to carry with it authority to enforce the withdrawal by federal injunctive process. *Dietzsch v. Huidekoper*, 103 U. S. 494; *Madisonville Traction Company v. Mining Com-*

pany, 196 U. S. 239; *Providence and N. Y. S. S. Company v. Hill Manufacturing Company*, 109 U. S. 578, 579. See also *Kalb v. Feuerstein*, 308 U. S. 433, under the Frazier-Lemke Act. Cf. cases cited *supra*, p. 39, under the National Labor Relations Act and the Public Utility Holding Company Act.

It is immaterial that the withdrawal of jurisdiction from the state court might have been raised as a defense in that proceeding.²¹ The same circumstance is present in the removal cases (see *Metropolitan Casualty Insurance Company v. Stevens*, 312 U. S. 563, 567) and does not preclude resort to a federal injunction. Nor is it material that the district court is not itself the exclusive federal forum for suits to set aside regulations. The authority of the federal district court does not depend upon Section 262 of the Judicial Code, authorizing writs in aid of its own jurisdiction. Its authority rests on its general equity powers and on Section 205 (a) of the Price Control Act. So far as Section 265 is concerned, the important fact is that the aid of a federal court may be had to enforce the Congressional preemption of jurisdiction in favor of one federal court to the exclusion of state courts.

²¹ Presumably the question could also be raised by habeas corpus in a federal court, upon a commitment by the state court for contempt. *Ohio v. Thomas*, 173 U. S. 276. That procedure would entail greater friction and conflict than does the injunction process.

CONCLUSION

For the foregoing reasons the decree below should be reversed.

Respectfully submitted.

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JANUARY 1944.

[PUBLIC LAW 421—77TH CONGRESS]

[CHAPTER 26—2D SESSION]

[H. R. 5990]

AN ACT

To further the national defense and security by checking speculative and excessive price rises, price dislocations, and inflationary tendencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—GENERAL PROVISIONS AND AUTHORITY

PURPOSES; TIME LIMIT; APPLICABILITY

SECTION 1. (a) It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. It shall be the policy of those departments and agencies of the Government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board, and others heretofore or hereafter created), within the limits of their authority and jurisdiction, to work toward a stabilization of prices; fair and equitable wages, and cost of production.

(b) The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1943, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations,

orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

(c). The provisions of this Act shall be applicable to the United States, its Territories and possessions, and the District of Columbia.

PRICES, RENTS, AND MARKET AND RENTING PRACTICES

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity, or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to

the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area.

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order.

(d) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, by regulation or order, regulate or prohibit speculative or manipulative practices (including practices relating to changes in form or quality) or hoarding, in connection with any commodity, and speculative or manipulative practices or renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense-area housing accommodations, which in his judgment are equivalent to or are likely to result in price or rent increases, as the case may be, inconsistent with the purposes of this Act.

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator, with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d; except that in the case of the sale of any commodity by any such corporation, the sale price therefor shall not exceed any maximum price established pursuant to subsection (a) of this section which is applicable to such commodity at the time of sale or delivery, but such sale price may be below such maximum price or below the purchase price of such commodity, and the Administrator may make recommendations with respect to the buying or selling, or storage or use, of any such commodity. In any case in which a commodity is domestically produced, the powers granted to the Administrator by this subsection shall be exercised with respect to importations of such commodity only to the extent that, in the judgment of the Administrator, the domestic production of the commodity is not sufficient to satisfy the demand therefor. Nothing in this section shall be construed to modify, suspend, amend, or supersede any provision of the Tariff Act of 1930, as amended, and nothing in this section, or in any existing law, shall be construed to authorize any sale or other disposition of any agricultural commodity contrary to the provisions of the Agricultural Adjustment Act of 1938, as amended, or to authorize the Administrator to prohibit trading in any agricultural commodity for future delivery if such trading is subject to the provisions of the Commodity Exchange Act, as amended.

(f) No power conferred by this section shall be construed to authorize any action contrary to the provisions and purposes of section 3; and no agricultural commodity shall be sold within the United States pursuant to the provisions of this section by any governmental agency at a price below the price limitations imposed by section 3 (a) of this Act with respect to such commodity.

(g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

(i) No maximum price shall be established for any fishery commodity below the average price of such commodity in the year 1941.

AGRICULTURAL COMMODITIES

SEC. 3. (a) No maximum price shall be established or maintained for any agricultural commodity below the highest of any of the following prices, as determined and published by the Secretary of Agriculture: (1) 110 per centum of the parity price for such commodity, adjusted by the Secretary of Agriculture for grade, location, and seasonal differentials, or, in case a comparable price has been determined for such commodity under subsection (b), 110 per centum of such comparable price, adjusted in the same manner, in lieu of 110 per centum of the parity price so adjusted; (2) the market price prevailing for such commodity on October 1, 1941; (3) the market price prevailing for such commodity on December 15, 1941; or (4) the average price for such commodity during the period July 1, 1919, to June 30, 1929.

(b) For the purposes of this Act, parity prices shall be determined and published by the Secretary of Agriculture as authorized by law. In the case of any agricultural commodity other than the basic crops corn, wheat, cotton, rice, tobacco, and peanuts, the Secretary shall determine and publish a comparable price whenever he finds, after investigation and public hearing, that the production and consumption of such commodity has so changed in extent or character since the base period as to result in a price out of line with parity prices for basic commodities.

(c) No maximum price shall be established or maintained for any commodity processed or manufactured in whole or substantial part from any agricultural commodity below a price which will reflect to producers of such agricultural commodity a price for such agricultural commodity equal to the highest price therefor specified in subsection (a).

(d) Nothing contained in this Act shall be construed to modify, repeal, supersede, or affect the provisions of the Agricultural Marketing Agreement Act of 1937, as amended, or to invalidate any marketing agreement, license, or order, or any provision thereof or amendment thereto, heretofore or hereafter made or issued under the provisions of such Act.

(e) Notwithstanding any other provision of this or any other law, no action shall be taken under this Act by the Administrator or any other person with respect to any agricultural commodity without the prior approval of the Secretary of Agriculture; except that the Administrator may take such action as may be necessary under section 202 and section 205 (a) and (b) to enforce compliance with any regulation, order, price schedule or other requirement with respect to an agricultural commodity which has been previously approved by the Secretary of Agriculture.

(f) No provision of this Act or of any existing law shall be construed to authorize any action contrary to the provisions and purposes of this section.

PROHIBITIONS

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) It shall be unlawful for any person to remove or attempt to remove from any defense-area housing accommodations the tenant or occupant thereof or to refuse to renew the lease or agreement for the use of such accommodations, because such tenant or occupant has taken, or proposes to take, action authorized or required by this Act or any regulation, order, or requirement thereunder.

(c) It shall be unlawful for any officer or employee of the Government, or for any adviser or consultant to the Administrator in his official capacity, to disclose, otherwise than in the course of official duty, any information obtained under this Act, or to use any such information, for personal benefit.

(d) Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.

VOLUNTARY AGREEMENTS

SEC. 5. In carrying out the provisions of this Act, the Administrator is authorized to confer with producers, processors, manufacturers, retailers, wholesalers, and other groups having to do with commodities, and with representatives and associations thereof, to cooperate with any agency or person, and to enter into voluntary arrangements or agreements with any such persons, groups, or associations relating to the fixing of maximum prices, the issuance of other regulations or orders, or the other purposes of this Act, but no such arrangement or agreement shall modify any regulation, order, or price schedule previously issued which is effective in accordance with the provisions of section 2 or section 206. The Attorney General shall be promptly furnished with a copy of each such arrangement or agreement.

TITLE II—ADMINISTRATION AND ENFORCEMENT**ADMINISTRATION**

Sec. 201. (a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(b) The principal office of the Administrator shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place. The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, and to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities; but, notwithstanding any provision of this or any other law, no powers or functions conferred by law upon the Secretary of Agriculture shall be transferred to the Office of Price Administration or to the Administrator, and no powers or functions conferred by law upon any other department or agency of the Government with respect to any agricultural commodity, except powers and functions relating to priorities or rationing, shall be so transferred.

(c) The Administrator shall have authority to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere; for lawbooks and books of reference; and for paper, printing, and binding) as he may deem necessary for the administration and enforcement of this Act. The provisions of section 3709 of the Revised Statutes shall not apply to the purchase of supplies and services by the Administrator where the aggregate amount involved does not exceed \$250.

(d) The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

INVESTIGATIONS; RECORDS; REPORTS

SEC. 202. (a) The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations, orders, and price schedules thereunder.

(b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

(c) For the purpose of obtaining any information under subsection (a), the Administrator may by subpena require any other person to appear and testify or to appear and produce documents, or both, at any designated place.

(d) The production of a person's documents at any place other than his place of business shall not be required under this section in any case in which, prior to the return date specified in the subpena issued with respect thereto, such person either has furnished the Administrator with a copy of such documents (certified by such person under oath to be a true and correct copy), or has entered into a stipulation with the Administrator as to the information contained in such documents.

(e) In case of contumacy by, or refusal to obey a subpena served upon, any person referred to in subsection (c), the district court for any district in which such person is found or resides or transacts business, upon application by the Administrator, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce documents, or both; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The provisions of this subsection shall also apply to any person referred to in subsection (b), and shall be in addition to the provisions of section 4 (a).

(f) Witnesses subpenaed under this section shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

(h) The Administrator shall not publish or disclose any information obtained under this Act that such Administrator deems confi-

dential or with reference to which a request for confidential treatment is made by the person furnishing such information; unless he determines that the withholding thereof is contrary to the interest of the national defense and security.

PROCEDURE

SEC. 203. (a) Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order (or in the case of a price schedule, ninety days after the effective date thereof specified in section 206) in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

(b) In the administration of this Act the Administrator may take official notice of economic data and other facts, including facts found by him as a result of action taken under section 202.

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs.

REVIEW

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have

exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and

fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title-28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

ENFORCEMENT

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with

State and Territorial courts, of all other proceedings under section 295 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 295 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

(d) No person shall be held liable for damages or penalties in any Federal, State, or Territorial court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. In any suit or action wherein a party relies for ground of relief or defense upon this Act or any regulation, order, price schedule, requirement, or agreement thereunder, the court having jurisdiction of such suit or action shall certify such fact to the Administrator. The Administrator may intervene in any such suit or action.

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action, under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

(f) (1) Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act and to assure compliance with and provide for the effective enforcement of any regulation or order issued or which may be issued under section 2, or of any price schedule effective in accordance with

the provisions of section 206, he may by regulation or order issue to or require of any person or persons subject to any regulation or order issued under section 2, or subject to any such price schedule, a license as a condition of selling any commodity or commodities with respect to which such regulation, order, or price schedule is applicable. It shall not be necessary for the Administrator to issue a separate license for each commodity or for each regulation, order, or price schedule with respect to which a license is required. No such license shall contain any provision which could not be prescribed by regulation, order, or requirement under section 2 or section 202: *Provided*, That no such license may be required as a condition of selling or distributing (except as waste or scrap) newspapers, periodicals, books, or other printed or written material, or motion pictures, or as a condition of selling radio time: *Provided further*, That no license may be required of any farmer as a condition of selling any agricultural commodity produced by him, and no license may be required of any fisherman as a condition of selling any fishery commodity caught or taken by him: *Provided further*, That in any case in which such a license is required of any person, the Administrator shall not have power to deny to such person a license to sell any commodity or commodities, unless such person already has such a license to sell such commodity or commodities, or unless there is in effect under paragraph (2) of this subsection with respect to such person an order of suspension of a previous license to the extent that such previous license authorized such person to sell such commodity or commodities.

(2) Whenever in the judgment of the Administrator a person has violated any of the provisions of a license issued under this subsection, or has violated any of the provisions of any regulation, order, or requirement under section 2 or section 202 (b), or any of the provisions of any price schedule effective in accordance with the provisions of section 206, which is applicable to such person, a warning notice shall be sent by registered mail to such person. If the Administrator has reason to believe that such person has again violated any of the provisions of such license, regulation, order, price schedule, or requirement after receipt of such warning notice, the Administrator may petition any State or Territorial court of competent jurisdiction, or a district court subject to the limitations hereinafter provided, for an order suspending the license of such person for any period of not more than twelve months. If any such court finds that such person has violated any of the provisions of such license, regulation, order, price schedule, or requirement after the receipt of the warning notice, such court shall issue an order suspending the license to the extent that it authorizes such person to sell the commodity or commodities in connection with which the violation occurred, or to the extent that it authorizes such person to sell any commodity or commodities with respect to which a regulation or order issued under section 2, or a price schedule effective in accordance with the provisions of section 206, is applicable; but no such suspension shall be for a period of more than twelve months. For the purposes of this subsection, any such proceedings for the suspension of a license may be brought in a district court if the licensee is doing business in more than one State, or if his gross sales exceed \$100,000 per annum. Within thirty days after the entry of the judgment or order of any

court either suspending a license, or dismissing or denying in whole or in part the Administrator's petition for suspension, an appeal may be taken from such judgment or order in like manner as an appeal may be taken in other cases from a judgment or order of a State, Territorial, or district court, as the case may be. Upon good cause shown, any such order of suspension may be stayed by the appropriate court or any judge thereof in accordance with the applicable practice; and upon written stipulation of the parties to the proceeding for suspension, approved by the trial court, any such order of suspension may be modified, and the license which has been suspended may be restored, upon such terms and conditions as such court shall find reasonable. Any such order of suspension shall be affirmed by the appropriate appellate court if, under the applicable rules of law, the evidence in the record supports a finding that there has been a violation of any provision of such license, regulation, order, price schedule, or requirement after receipt of such warning notice. No proceedings for suspension of a license, and no such suspension, shall confer any immunity from any other provision of this Act.

SAVING PROVISIONS

SEC. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. Such price schedules shall be consistent with the standards contained in section 2 and the limitations contained in section 3 of this Act, and shall be subject to protest and review as provided in section 203 and section 204 of this Act. All such price schedules shall be reprinted in the Federal Register within ten days after the date upon which such Administrator takes office.

TITLE III—MISCELLANEOUS

QUARTERLY REPORT

SEC. 301. The Administrator from time to time, but not less frequently than once every ninety days, shall transmit to the Congress a report of operations under this Act. If the Senate or the House of Representatives is not in session, such reports shall be transmitted to the Secretary of the Senate, or the Clerk of the House of Representatives, as the case may be.

DEFINITIONS

SEC. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offsets to do any of the foregoing. The terms "sell", "selling", "seller", "buy", and "buyer", shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

(c) The term "commodity" means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap); and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity; or in connection with the operation of any service establishment for the servicing of a commodity: *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility, or (3) rates charged by any person engaged in the business of selling or underwriting insurance, or (4) rates charged by any person engaged in the business of operating or publishing a newspaper, periodical, or magazine, or operating a radio-broadcasting station, a motion-picture or other theater enterprise, or outdoor advertising facilities, or (5) rates charged for any professional services.

(d) The term "defense-rental area" means the District of Columbia and any area designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act.

(e) The term "defense-area housing accommodations" means housing accommodations within any defense-rental area.

(f) The term "housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, hotels, rooming or boarding house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

(g) The term "rent" means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations.

(h) The term "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing: *Provided*, That no punishment provided by this Act shall apply to the United States, or to any such government, political subdivision, or agency.

(i) The term "maximum price", as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations. Maximum prices and maximum rents may be formulated, as the case may be, in terms of prices, rents, margins, commissions, fees, and other charges, and allowances.

(j) The term "documents" includes records, books, accounts, correspondence, memoranda, and other documents, and drafts and copies of any of the foregoing.

(k) The term "district court" means any district court of the United States, and the United States Court for any Territory or other place subject to the jurisdiction of the United States; and the term "circuit courts of appeals" includes the United States Court of Appeals for the District of Columbia.

SEPARABILITY

SEC. 303. If any provision of this Act or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons or circumstances shall not be affected thereby.

APPROPRIATIONS AUTHORIZED

SEC. 304. There are authorized to be appropriated such sums as may be necessary or proper to carry out the provisions and purposes of this Act.

APPLICATION OF EXISTING LAW

SEC. 305. No provision of law in force on the date of enactment of this Act shall be construed to authorize any action inconsistent with the provisions and purposes of this Act.

SHORT TITLE

SEC. 306. This Act may be cited as the "Emergency Price Control Act of 1942".

Approved, January 30, 1942.

**OFFICE OF PRICE ADMINISTRATION
WASHINGTON, D. C.**

TYPICAL MAXIMUM RENT REGULATION FOR HOUSING ACCOMMODATIONS OTHER THAN HOTELS AND ROOMING HOUSES

[*Note.—The following is a typical Maximum Rent Regulation for housing accommodations other than hotels and rooming houses. The provisions of Supplementary Amendments 1 to 17, inclusive, and other amendments to Maximum Rent Regulations for Housing Accommodations Other Than Hotels and Rooming Houses, issued and effective prior to April 12, 1943, are included in this typical Regulation.*

Maximum Rent Regulations have been issued with five different maximum rent dates: January 1, 1941, April 1, 1941, July 1, 1941, October 1, 1941, and March 1, 1942. Maximum Rent Regulations have been issued with nine different effective dates: June 1, 1942, July 1, 1942, August 1, 1942, September 1, 1942, October 1, 1942, November 1, 1942, December 1, 1942, December 12, 1942, and January 1, 1943. In order to make the following typical Maximum Rent Regulation applicable to a particular defense-rental area, it is necessary to determine the maximum rent date and the effective date of the Maximum Rent Regulation for that particular defense-rental area. This determination can be made by consulting the Area Rent Office for the particular defense-rental area.]

SECTION 1. Scope of regulation.—(a) This Maximum Rent Regulation applies to all housing accommodations within the [insert name of the area] Defense-Rental Area, as designated in the Designation and Rent Declaration issued by the Administrator on [insert date of issuance of Designation and Rent Declaration], except as provided in paragraph (b) of this section.

(b) This Maximum Rent Regulation does not apply to the following:

(1) Housing accommodations situated on a farm and occupied by a tenant who is engaged for a substantial portion of his time in farming operations thereon;

(2) Dwelling space occupied by domestic servants, caretakers, managers, or other employees to whom the space is provided as part of their compensation and who are employed for the purpose of rendering services in connection with the premises of which the dwelling space is a part;

(3) Rooms or other housing accommodations within hotels or rooming houses, or housing accommodations which have been, with the consent of the Administrator, brought under the control of the Maximum Rent Regulation for Hotels and Rooming Houses pursuant to the provisions of that regulation.

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(4) Entire structures or premises wherein more than 25 rooms are rented or offered for rent by any lessee, sublessee or other tenant of such entire structure or premises: *Provided*, That this Maximum Rent Regulation does apply to entire structures or premises wherein 25 or less rooms are rented or offered for rent by any lessee, sublessee or other tenant of such entire structure or premises, whether or not used by the lessee, sublessee or other tenant as a hotel or rooming house: *And provided further*, That this Maximum Rent Regulation does apply to an underlying lease of any entire structure or premises which was entered into after [insert maximum rent date] and prior to the effective date of this Maximum Rent Regulation, while such lease remains in force with no power in the tenant to cancel or otherwise terminate the lease.

(5) Housing accommodations rented to the United States acting by the National Housing Agency: *Provided, however*, That this Maximum Rent Regulation does apply to a sublease or other subrenting of such accommodations or any part thereof.

(c) The provisions of any lease or other rental agreement shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with this Maximum Rent Regulation.

(d) An agreement by the tenant to waive the benefit of any provision of this Maximum Rent Regulation is void. A tenant shall not be entitled by reason of this Maximum Rent Regulation to refuse to pay or to recover any portion of any rents due or paid for use or occupancy prior to the effective date of this Maximum Rent Regulation.¹

SECTION 2. Prohibition against higher than maximum rents.—(a) Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for use or occupancy on and after the effective date of this Maximum Rent Regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this Maximum Rent Regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this Maximum Rent Regulation may be demanded or received.

(b) Notwithstanding any other provision of this Maximum Rent Regulation, where housing accommodations are heated with fuel oil the landlord of such accommodations may as hereinafter provided enter into an agreement with the tenant providing for payment by the tenant of part or all of the cost of changing the heating unit to use some fuel other than oil or of installing a new heating unit using some fuel other than oil. Prior to making such agreement the landlord shall in writing report the terms of the proposed agreement to the Area Rent Office. The landlord may enter into the agreement either upon its approval by the Administrator or, unless the Administrator has disapproved the proposed agreement within five days after the filing of such report, upon the expiration of such 5-day period.

(c) Where a lease of housing accommodations was entered into

¹ In Maximum Rent Regulation No. 51 (Fort Worth, Tex.), insert "November 1, 1942," instead of the words "the effective date of this Maximum Rent Regulation." In other parts of Maximum Rent Regulation No. 51 insert "the effective date of this section" for the words "the effective date of this Maximum Rent Regulation." Sections 1, 6, and 13 of Maximum Rent Regulation No. 51 were effective October 15, 1942, and the remaining sections of Maximum Rent Regulation No. 51 were effective November 1, 1942.

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prior to the effective date of this Maximum Rent Regulation² and the tenant as a part of such lease or in connection therewith was granted an option to buy the housing accommodations which were the subject of the lease, with the further provision that some or all of the payments made under the lease should be credited toward the purchase price in the event such option is exercised, the landlord, notwithstanding any other provision of this Maximum Rent Regulation, may be authorized to receive payments made by the tenant in accordance with the provisions of such lease and in excess of the maximum rent for such housing accommodations. Such authority may be secured only by a written request of the tenant to the Area Rent Office and shall be granted by order of the Administrator if he finds that such payments in excess of the maximum rent will not be inconsistent with the purposes of the Act or this Maximum Rent Regulation and would not be likely to result in the circumvention or evasion thereof. After entry of such order the landlord shall be authorized to demand, receive and retain payments provided by the lease in excess of the maximum rent for periods commencing on or after the effective date of this Maximum Rent Regulation. After entry of such order, the provisions of the lease may be enforced in accordance with law, notwithstanding any other provision of this Maximum Rent Regulation: *Provided, however,* That if at the termination of the lease the tenant shall not exercise the option to buy, the landlord may thereafter remove or evict the tenant only in accordance with the provisions of Section 6 of this Maximum Rent Regulation. Nothing in this paragraph shall be construed to authorize the landlord to demand or receive payments in excess of the maximum rent in the absence of an order of the Administrator as herein provided. Where a lease of housing accommodations has been entered into on or after the effective date of this Maximum Rent Regulation,² and the tenant as a part of such lease or in connection therewith has been granted an option to buy the housing accommodations which are the subject of the lease, the landlord, prior to the exercise by the tenant of the option to buy, shall not demand, or receive payments in excess of the maximum rent, whether or not such lease allocates some portion or portions of the periodic payments therein provided as payments on or for the option to buy.

SECTION 3. Minimum services, furniture, furnishings and equipment.—Except as set forth in Section 5 (b), every landlord shall, as a minimum, provide with housing accommodations the same essential services, furniture, furnishings, and equipment as those provided on the date determining the maximum rent, and as to other services, furniture, furnishings, and equipment not substantially less than those provided on such date: *Provided, however,* That where fuel oil is used to supply heat or hot water for housing accommodations, and the landlord provided heat or hot water on the date determining the maximum rent, the heat and hot water which the landlord is required to supply shall not be in excess of the amount which he can supply under any statute, regulation or order of the United States or any agency thereof which rationed or limits the use of fuel oil.

² In Maximum Rent Regulations with an effective date of October 1, 1942, or earlier, insert "October 29, 1942," instead of the words "the effective date of this Maximum Rent Regulation," except that for Maximum Rent Regulation No. 51 insert "November 1, 1942."

SECTION 4. Maximum rents.—Maximum rents (unless and until changed by the Administrator as provided in Section 5) shall be:

(a) For housing accommodations rented on [insert maximum rent date], the rent for such accommodations on that date.

(b) For housing accommodations not rented on [insert maximum rent date], but rented at any time during the two months ending on that date, the last rent for such accommodations during that two-month period.

(c) For housing accommodations not rented on [insert maximum rent date] nor during the two months ending on that date, but rented prior to the effective date of this Maximum Rent Regulation, the first rent for such accommodations after [insert maximum rent date]. The Administrator may order a decrease in the maximum rent as provided in Section 5 (c).

(d) For (1) newly constructed housing accommodations without priority rating first rented after [insert maximum rent date] and before the effective date of this Maximum Rent Regulation, or (2) housing accommodations changed between those dates so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations changed between those dates from unfurnished to fully furnished, or from fully furnished to unfurnished, or (4) housing accommodations substantially changed between those dates by a major capital improvement as distinguished from ordinary repair, replacement and maintenance, the first rent for such accommodations after such construction or change: *Provided, however,* That, where such first rent was fixed by a lease which was in force at the time of a major capital improvement, the maximum rent shall be the first rent after termination of such lease. The Administrator may order a decrease in the maximum rent as provided in Section 5 (c).

(e) For (1) newly constructed housing accommodations without priority rating first rented on or after the effective date of this Maximum Rent Regulation, or (2) housing accommodations changed on or after such effective date so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations not rented at any time between [insert date 2 months before maximum rent date] and such effective date, the first rent for such accommodations after the change or the effective date, as the case may be.³ Within 30 days after so renting the landlord shall register the accommodations as provided in Section 5. The Administrator may order a decrease in the maximum rent as provided in Section 5 (c).

(f) For housing accommodations constructed with priority rating from the United States or any agency thereof for which the rent has been heretofore or is hereafter approved by the United States or any agency thereof, the rent so approved, but in no event more than the rent on [insert maximum rent date], or, if the accommodations were not rented on that date, more than the first rent after that date.

³ In Maximum Rent Regulations with an effective date of September 1, 1942, or earlier, add the following words: "but in no event more than the maximum rent provided for such accommodations by any order of the Administrator issued prior to September 22, 1942."

The above language in Section 4 (f) is contained in all Maximum Rent Regulations with a maximum rent date of March 1, 1942. In Maximum Rent Regulations with a 1942 maximum rent date, the language in Section 4 (f) is as follows: "For housing accommodations

(g) For housing accommodations constructed by the United States or any agency thereof, or by a State of the United States or any of its political subdivisions, or any agency of the State or any of its political subdivisions, and owned by any of the foregoing, the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on [insert maximum rent date], as determined by the owner of such accommodations: *Provided, however,* That any corporation formed under the laws of a State shall not be considered an agency of the United States within the meaning of this paragraph. The Administrator may order a decrease in the maximum rent as provided in section 5 (e).

(h) For housing accommodations rented to either Army or Navy personnel, including civilian employees of the War and Navy Departments, for which the rent is fixed by the national rent schedule of the War or Navy Department, the rents established on the effective date of this Maximum Rent Regulation by such rent schedule. The Administrator may order an increase in such rents, if he finds that such increase is not inconsistent with the purposes of the Act or this Maximum Rent Regulation.

(i) For housing accommodations with a maximum rent established, prior to March 1, 1943, under the first paragraph of Section 5 (e) as that paragraph appeared in this Maximum Rent Regulation prior to such date,³ the rent on March 1, 1943; or, if the accommodations were not rented on that date, the last rent prior thereto, but in no event more than the maximum rent established under such first paragraph of Section 5 (e). The Administrator may order a decrease in the maximum rent as provided in Section 5 (e) (8).

SECTION 5. Adjustments and other determinations. In the circumstances enumerated in this section, the Administrator may issue an order changing the maximum rents otherwise allowable or the minimum services required. In those cases involving a major capital improvement, an increase or decrease in the furniture, furnishings, or equipment; an increase or decrease of services, an increase or decrease in the number of subtenants or other occupants, or a deterioration, the adjustment in the maximum rent shall be the amount the Administrator finds would have been on [insert maximum rent date], the difference in the rental value of the housing accommodations by reason of such change: *Provided, however,* That no adjustment shall be ordered where it appears that the rent on the date determining the maximum rent was fixed in contemplation of and so as to reflect such change. In all other cases, except those under paragraph (a)(7) and (e)(6) of this section, the adjustment shall be on the basis of the rent which the Administrator finds was generally prevailing in the Defense-Rental Area for comparable housing accommodations on [insert maximum rent date]:

constructed with priority rating from the United States or any agency thereof for which the rent has been heretofore or is hereafter approved by the United States or any agency thereof, the rent so approved, but in no event more than the first rent for such accommodations." In Maximum Rent Regulation No. 52 (Santa Maria, Calif.), however, the language is as set forth above for Maximum Rent Regulations with maximum rent date of March 1, 1942.

³ Prior to March 1, 1943, the first paragraph of Section 5 (e) read as follows: "Where, at the expiration or other termination of an underlying lease or other rental agreement, housing accommodations or a predominant part thereof are occupied by one or more subtenants or other persons occupying under a rental agreement with the tenant, the landlord may rent the entire premises for use by similar occupancies for a rent not in excess of the aggregate maximum rents of the separate dwelling units, or may rent the separate dwelling units for rents not in excess of the maximum rents applicable to such units."

Provided, That in cases under paragraph (c)(8) of this section due consideration shall be given to any increased occupancy of the accommodations since that date by subtenants or other persons occupying under a rental agreement with the tenant. In cases involving construction, due consideration shall be given to increased costs of construction, if any, since [insert maximum rent date]. In cases under paragraph (a)(7) and (c)(6) of this section the adjustment shall be on the basis of the rents which the Administrator finds were generally prevailing in the Defense-Rental Area for comparable housing accommodations during the year ending on [insert maximum rent date].

(a) Any landlord may file a petition for adjustment to increase the maximum rent otherwise allowable, only on the grounds that:

(1) There has been on or after the effective date of this Maximum Rent Regulation a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement and maintenance.

(2) There was, on or prior to [insert maximum rent date], a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement and maintenance, and the rent on [insert maximum rent date] was fixed by a lease or other rental agreement which was in force at the time of such change.

(3) There has been a substantial increase in the services, furniture, furnishings or equipment provided with the housing accommodations since the date or order determining its maximum rent. No increase in the maximum rent shall be ordered on the ground set forth in this paragraph (a) (3) unless the increase in services, furniture, furnishings or equipment occurred with the consent of the tenant or while the accommodations were vacant: *Provided*, That an adjustment may be ordered, although the tenant refuses to consent to the increase in services, furniture, furnishings or equipment, if the Administrator finds that such increase (i) is reasonably required for the operation of a multiple dwelling structure or other structure of which the accommodations are a part or (ii) is necessary for the preservation or maintenance of the accommodations.

(4) The rent on the date determining the maximum rent was materially affected by the blood, personal or other special relationship between the landlord and the tenant and as a result was substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on [insert maximum rent date]: *Provided*, That no adjustment under this subparagraph increasing the maximum rent shall be made effective with respect to any accommodations regularly rented to employees of the landlord while the accommodations are rented to an employee, and no petition for such an adjustment will be entertained until the accommodations have been or are about to be rented to one other than an employee.

(5) There was in force on [insert maximum rent date], a written lease, for a term commencing on or prior to [insert date one year before maximum rent date], requiring a rent substantially lower

than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on [insert maximum rent date]; or the housing accommodations were not rented on [insert maximum rent date], but were rented during the two months ending on that date and the last rent for such accommodations during that two-month period was fixed by a written lease, for a term commencing on or prior to [insert date one year before maximum rent date], requiring a rent substantially lower than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on [insert maximum rent date].

(6) The rent on the date determining the maximum rent was established by a lease or other rental agreement which provided for a substantially higher rent at other periods during the term of such lease or agreement.

(7) The rent on the date determining the maximum rent was substantially lower than at other times of year by reason of seasonal demand, or seasonal variations in the rent, for such housing accommodations. In such cases the Administrator's order may if he deems it advisable provide for different maximum rents for different periods of the calendar year.

(8) There has been, since [insert maximum rent date], either (i) a substantial increase in the number of subtenants or other persons occupying the accommodations or a part thereof under a rental agreement with the tenant, or (ii) a substantial increase in the number of occupants, in excess of normal occupancy for that class of accommodations on [insert maximum rent date], or (iii) an increase in the number of occupants over the number contemplated by the rental agreement on the date determining the maximum rent, where the landlord on that date had a regular and definite practice of fixing different rents for the accommodations for different numbers of occupants.

(b) (1) If, on the effective date of this Maximum Rent Regulation, the services provided for housing accommodations are less than the minimum services required by Section 3, the landlord shall either restore and maintain such minimum services or, within 30 days⁴ after such effective date, file a petition requesting approval of the decreased services. If, on such effective date, the furniture, furnishings or equipment provided with housing accommodations are less than the minimum required by Section 3, the landlord shall, within 30 days after such date, file a written report showing the decrease in furniture, furnishings or equipment.

(2) Except as above provided, the landlord shall, until the accommodations become vacant, maintain the minimum services, furniture, furnishings, and equipment unless and until he has filed a petition to decrease the services, furniture, furnishings, or equipment and an order permitting a decrease has been entered thereon; however, if it is impossible to provide the minimum services, furniture, furnishings, or equipment he shall file a petition within 40 days after the change occurs. When the accommodations become vacant the landlord may,

⁴In Maximum Rent Regulation No. 53, insert, for the Los Angeles Defense-Rental Area, "60 days" instead of "30 days."

⁵In Maximum Rent Regulations with an effective date of November 1, 1942, or earlier, insert "December 1, 1942," instead of the words "such effective date."

on renting to a new tenant, decrease the services, furniture, furnishings, or equipment below the minimum; within 10 days after so renting the landlord shall file a written report showing such decrease.

(3) The order on any petition under this paragraph may require an appropriate adjustment in the maximum rent; and any maximum rent for which a report is required by this paragraph may be decreased in accordance with the provisions of Section 5 (e) (3). If the landlord fails to file the petition or report required by this paragraph within the time specified, or decreases the services, furniture, furnishings, or equipment without an order authorizing such decrease where such order is required, the rent received by the landlord for any rental period commencing on or after such decrease or the effective date of this Maximum Rent Regulation,⁷ whichever is the later, shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by any order decreasing the maximum rent on account of such decrease in services, furniture, furnishings, or equipment. In such case, any order decreasing the maximum rent shall be effective to decrease such rent from the beginning of the first rental period after the decrease in services, furniture, furnishings, or equipment or after the effective date of this Maximum Rent Regulation,⁷ whichever is the later. The foregoing provisions and any refund thereunder do not affect any civil or criminal liability provided by the Act for failure to comply with any requirement of this paragraph.

(c) The Administrator at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

(1) The maximum rent for housing accommodations under paragraph (c), (d), (e), or (g) of Section 4 is higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on [insert maximum rent date].

(2) There has been a substantial deterioration of the housing accommodations other than ordinary wear and tear since the date or order determining its maximum rent.

(3) There has been a decrease in the minimum services, furniture, furnishings, or equipment required by Section 3 since the date or order determining the maximum rent.

(4) The rent on the date determining the maximum rent was materially affected by the blood, personal, or other special relationship between the landlord and the tenant and as a result was substantially higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on [insert maximum rent date].

(5) The rent on the date determining the maximum rent was established by a lease or other rental agreement which provided for a substantially lower rent at other periods during the term of such lease or agreement.

(6) The rent on the date determining the maximum rent was substantially higher than at other times of year by reason of seasonal demand, or seasonal variations in the rent, for such housing accommodations. In such cases the Administrator's order may if he deems it advisable provide for different maximum rents for different periods of the calendar year.

(7) There has been a substantial decrease in the number of subtenants or other occupants since an order under paragraph (a) (8) or (e) (8) of this section.

(8) The maximum rent is established under Section 4 (i) and is higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on [insert maximum rent date], taking into consideration any increased occupancy of such accommodations since that date by subtenants or other persons occupying under a rental agreement with the tenant: *Provided*, That no decrease shall be ordered below the rent on [insert maximum rent date].

(d) If the rent on the date determining the maximum rent, or any other fact necessary to the determination of the maximum rent, is in dispute between the landlord and the tenant; or is in doubt, or is not known, the Administrator on petition of the landlord filed within 30 days after the effective date of this Maximum Rent Regulation, or at any time on his own initiative, may enter an order fixing the maximum rent by determining such fact; or if the Administrator is unable to ascertain such fact he shall enter the order on the basis of the rent which he finds was generally prevailing in the Defense-Rental Area for comparable housing accommodations on [insert maximum rent date].

(e) Where housing accommodations or a predominant part thereof, are occupied by one or more subtenants or other persons occupying under a rental agreement with the tenant, the tenant may petition the Administrator for leave to exercise any right he would have except for this Maximum Rent Regulation to sell his underlying lease or other rental agreement. The Administrator may grant such petition if he finds that the sale will not result, and that sales of such character would not be likely to result, in the circumvention or evasion of the Act or this Maximum Rent Regulation. He may require that the sale be made on such terms as he deems necessary to prevent such circumvention or evasion.

(f) Where a petition is filed by a landlord on one of the grounds set out in paragraph (a) of this section, the Administrator may enter an interim order increasing the maximum rent until further order, subject to refund by the landlord to the tenant of any amount received in excess of the maximum rent established by final order upon such petition. The receipt by the landlord of any increased rent authorized by such interim order shall constitute an agreement by the landlord with the tenant to refund to the tenant any amount received in excess of the maximum rent established by final order. The landlord shall make such refund either by repayment in cash or, where the tenant remains in occupancy after the effective date of the final order, by deduction from the next instalment of rent, or both.

(g) No adjustment in the maximum rent shall be ordered on the ground that the landlord, since the date or order determining the maximum rent, has, as a part of or in connection with a lease of housing accommodations, granted the tenant an option to buy the accommodations which are the subject of the lease. Where a lease of housing accommodations was in force on the date determining the maximum rent, and the landlord had on that date, as a part of

or in connection with such lease, granted the tenant an option to buy the accommodations which are the subject of the lease, the Administrator may, on or after the termination of such lease, on his own initiative or on application of the tenant, enter an order fixing the maximum rent on the basis of the rents which the Administrator finds were generally prevailing in the Defense-Rental Area for comparable housing accommodations not subject to an option to buy on [insert maximum rent date].

SECTION 6. Restrictions on removal of tenant.—(a) So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations, by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which provides for entry of judgment upon the tenant's confession for breach of the covenants thereof or which otherwise provides contrary hereto, unless:

(1) The tenant, who had a written lease or other written rental agreement, has refused upon demand of the landlord to execute a written extension or renewal thereof for a further term of like duration but not in excess of one year but otherwise on the same terms and conditions as the previous lease or agreement, except insofar as such terms and conditions are inconsistent with this Maximum Rent Regulation; or

(2) The tenant has unreasonably refused the landlord access to the housing accommodations for the purpose of inspection or of showing the accommodations to a prospective purchaser, mortgagee or prospective mortgagee, or other person having a legitimate interest therein: *Provided, however,* That such refusal shall not be ground for removal or eviction if such inspection or showing of the accommodations is contrary to the provisions of the tenant's lease or other rental agreement; or

(3) The tenant (i) has violated a substantial obligation of his tenancy, other than an obligation to pay rent, and has continued, or failed to cure, such violation after written notice by the landlord that the violation cease, or (ii) is committing or permitting a nuisance or is using or permitting a use of the housing accommodations for an immoral or illegal purpose; or

(4) The tenant's lease or other rental agreement has expired or otherwise terminated, and at the time of termination the occupants of the housing accommodations are subtenants or other persons who occupied under a rental agreement with the tenant, and no part of the accommodations is used by the tenant as his own dwelling.

(5) The landlord seeks in good faith to recover possession for the immediate purpose of demolishing the housing accommodations or of substantially altering or remodeling it in a manner which cannot practicably be done with the tenant in occupancy and the plans for such alteration or remodeling have been approved by the proper authorities, if such approval is required by local law; or

(6) The landlord owned, or acquired an enforceable right to buy or the right to possession of, the housing accommodations prior to the

effective date of this Maximum Rent Regulation,⁸ and seeks in good faith to recover possession of such accommodations for immediate use and occupancy as a dwelling for himself. If a tenant has been removed or evicted under this paragraph (a) (6) from housing accommodations, the landlord shall file a written report on a form provided therefor before renting the accommodations or any part thereof during a period of six months after such removal or eviction.

(b) (1) No tenant shall be removed or evicted on grounds other than those stated above unless, on petition of the landlord, the Administrator certifies that the landlord may pursue his remedies in accordance with the requirements of the local law. The Administrator shall so certify if the landlord establishes that removals or evictions of the character proposed are not inconsistent with the purposes of the Act or this Maximum Rent Regulation and would not be likely to result in the circumvention or evasion thereof.

(2) Removal or eviction of a tenant of the vendor, for occupancy by a purchaser who has acquired his rights in the housing accommodations on or after the effective date of this Maximum Rent Regulation,⁸ is inconsistent with the purposes of the Act and this Maximum Rent Regulation and would be likely to result in the circumvention or evasion thereof, unless (i) the payment or payments of principal made by the purchaser, excluding any payments made from funds borrowed for the purpose of making such principal payments, aggregate 33 $\frac{1}{3}$ % or more of the purchase price, and (ii) a period of three months has elapsed after the issuance of a certificate by the Administrator as hereinafter provided. For the purposes of this paragraph (b) (2), the payments of principal may be made by the purchaser conditionally or in escrow to the end that they shall be returned to the purchaser in the event the Administrator denies a petition for a certificate. If the Administrator finds that the required payments of principal have been made, he shall, on petition of either the vendor or purchaser, issue a certificate authorizing the vendor or purchaser to pursue his remedies for removal or eviction of the tenant in accordance with the requirements of the local law at the expiration of three months after the date of issuance of such certificate.

In no other case shall the Administrator issue a certificate for occupancy by a purchaser who has acquired his rights in the housing accommodations on or after the effective date of this Maximum Rent Regulation,⁸ unless he finds (i) that the vendor has or had a substantial necessity requiring the sale and that a reasonable sale or disposition of the accommodations could not be made without removal or eviction of the tenant, or (ii) that other special hardship would result, or (iii) that equivalent accommodations are available for rent, into which the tenant can move without substantial hardship or loss; under such circumstances the payment by the purchaser of 33 $\frac{1}{3}$ % of the purchase price shall not be a condition to the issuance of a certificate, and the certificate may authorize the vendor or purchaser, either immediately or at the expiration of three months, to pursue

⁸In Maximum Rent Regulations with an effective date of October 1, 1942, or earlier, insert "October 20, 1942," instead of the words "the effective date of this Maximum Rent Regulation." In Maximum Rent Regulation No. 60 (Adams and Clay Counties, Neb.), insert "November 6, 1942," for the words "the effective date of this Maximum Rent Regulation." In Maximum Rent Regulation No. 51 (Fort Worth, Tex.), insert "November 1, 1942," for the words "the effective date of this Maximum Rent Regulation."

his remedies for removal or eviction of the tenant in accordance with the requirements of the local law.

(c) (1) The provisions of this section do not apply to a subtenant or other person who occupied under a rental agreement with the tenant, where removal or eviction of the subtenant or other such occupant is sought by the landlord of the tenant, unless under the local law there is a tenancy relationship between the landlord and the subtenant or other such occupant.

(2) The provisions of this section shall not apply to housing accommodations rented to either Army or Navy personnel, including civilian employees of the War and Navy Departments, for which the rent is fixed by the national rent schedule of the War or Navy Department.

(3) The provisions of this section shall not apply to an occupant of a furnished room or rooms not constituting an apartment, located within the residence occupied by the landlord or his immediate family, where such landlord rents to not more than two occupants within such residence.

(d) (1) Every notice to a tenant to vacate or surrender possession of housing accommodations shall state the ground upon which the landlord relies for removal or eviction of the tenant. A written copy of such notice shall be given to the Area Rent Office within 24 hours after the notice is given to the tenant.

No tenant shall be removed or evicted from housing accommodations by court process or otherwise, unless, at least ten days (or, where the ground for removal or eviction is non-payment of rent, the period required by the local law for notice prior to the commencement of an action for removal or eviction in such cases, but in no event less than three days) prior to the time specified for surrender of possession and to the commencement of any action for removal or eviction, the landlord has given written notices of the proposed removal or eviction to the tenant and to the Area Rent Office, stating the ground under this section upon which such removal or eviction is sought and specifying the time when the tenant is required to surrender possession.

Where the ground for removal or eviction of a tenant is non-payment of rent, every notice under this paragraph (d) (1) shall state the rent for the housing accommodations, the amount of rent due and the rental period or periods for which such rent is due. The provisions of this paragraph (d) (1) shall not apply where a certificate has been issued by the Administrator pursuant to the provisions of paragraph (b) of this section.

(2) At the time of commencing any action to remove or evict a tenant, including an action based upon nonpayment of rent, the landlord shall give written notice thereof to the Area Rent Office stating the title of the case, the number of the case where that is possible, the court in which it is filed, the name and address of the tenant.

* In Maximum Rent Regulation No. 24 (Baltimore, Maryland), add "Provided, however, that the requirements of this sentence shall not apply to housing accommodations within the City of Baltimore, Maryland, when the ground for the removal or eviction of a tenant is non-payment of rent."

In Maximum Rent Regulation No. 28, add the above proviso substituting the words "Northeastern New Jersey Defense-Rental Area" for the words "City of Baltimore, Maryland."

In Maximum Rent Regulation No. 53, add the above proviso substituting the words "Trenton Defense-Rental Area" for the words "City of Baltimore, Maryland."

and the ground under this section on which removal or eviction is sought.

(e) No provision of this section shall be construed to authorize the removal of a tenant unless such removal is authorized under the local law.

SECTION 7. Registration.—Within 45 days¹⁰ after the effective date of this Maximum Rent Regulation, or within 30 days after the property is first rented, whichever date is the later, every landlord of housing accommodations rented or offered for rent shall file in triplicate a written statement on the form provided therefor to be known as a registration statement. The statement shall identify each dwelling unit and specify the maximum rent provided by this Maximum Rent Regulation for such dwelling unit and shall contain such other information as the Administrator shall require. The original shall remain on file with the Administrator and he shall cause one copy to be delivered to the tenant and one copy, stamped to indicate that it is a correct copy of the original, to be returned to the landlord. In any subsequent change of tenancy the landlord shall exhibit to the new tenant his stamped copy of the registration statement, and shall obtain the tenant's signature and the date thereof, on the back of such statement. Within five days after renting to a new tenant, the landlord shall file a notice on the form provided therefor, on which he shall obtain the tenant's signature, stating that there has been a change in tenancy, that the stamped copy of the registration statement has been exhibited to the new tenant and that the rent for such accommodations is in conformity therewith.

No payment of rent need be made unless the landlord tenders a receipt for the amount to be paid.

When the maximum rent is changed by order of the Administrator, the landlord shall deliver his stamped copy of the registration statement to the Area Rent Office for appropriate action reflecting such change.

The foregoing provisions of this section shall not apply to housing accommodations under Section 4(g). The owner of such housing accommodations shall file a schedule or schedules, setting out the maximum rents for all such accommodations in the Defense-Rental Area and containing such other information as the Administrator shall require. A copy of such schedule or schedules shall be posted by the owner in a place where it will be available for inspection by the tenants of such housing accommodations.

The provisions of this section shall not apply to housing accommodations rented to either Army or Navy personnel, including any civilian employees of the War and Navy Departments, for which the rent is fixed by the national rent schedule of the War or Navy Department.¹¹

SECTION 8. Inspection.—Any person who rents or offers for rent or acts as a broker or agent for the rental of housing accommoda-

¹⁰ In some Maximum Rent Regulations "90 days" or "75 days" instead of "45 days" are provided; for the Alaska Defense Rental Area "135 days" are provided.

¹¹ At the end of Section 7 of Maximum Rent Regulation No. 53, effective November 1, 1942, the following paragraph is added (as amended): "The provisions of this section shall not apply to housing accommodations in the Cincinnati Defense-Rental Area, except that no payment of rent need be made unless the landlord tenders a receipt for the amount to be paid."

tions and any tenant shall permit such inspection of the accommodations by the Administrator as he may, from time to time, require.

SECTION 9. *Evasion.*—The maximum rents and other requirements provided in this Maximum Rent Regulation shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease of housing accommodations, by way of absolute or conditional sale, sale with purchase money or other form or mortgage, or sale with option to repurchase, or by modification of the practices relating to payment of commissions or other charges or by modification of the services furnished with housing accommodations, or otherwise.

SECTION 10. *Enforcement.*—Persons violating any provision of this Maximum Rent Regulation are subject to criminal penalties, civil enforcement actions and suits for treble damages as provided for by the Act.

SECTION 11. *Procedure.*—All registration statements, reports and notices provided for by this Maximum Rent Regulation shall be filed with the Area Rent Office. All landlord's petitions and tenant's applications shall be filed with such office in accordance with Procedural Regulation No. 3.

SECTION 12. *Petitions for amendment.*—Persons seeking any amendment of general applicability to any provision of this Maximum Rent Regulation may file petitions therefor in accordance with Procedural Regulation No. 3.

SECTION 13. *Definitions.*—(a) When used in this Maximum Rent Regulation:

(1) The term "Act" means the Emergency Price Control Act of 1942.

(2) The term "Administrator" means the Price Administrator of the Office of Price Administration, or the Rent Director or such other person or persons as the Administrator may appoint or designate to carry out any of the duties delegated to him by the Act.

(3) The term "Rent Director" means the person designated by the Administrator as director of the Defense-Rental Area or such person or persons as may be designated to carry out any of the duties delegated to the Rent Director by the Administrator.

(4) The term "Area Rent Office" means the office of the Rent Director in the Defense-Rental Area.

(5) The term "person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing.

(6) The term "housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, together with all privileges, services, furnishings, furniture, equipment, facilities and improvements connected with the use or occupancy of such property.

(7) The term "services" includes repairs, decorating and maintenance, the furnishing of light, heat, hot and cold water, telephone, elevator service, window shades, and storage, kitchen, bath, and laundry facilities and privileges, maid service, linen service, janitor serv-

ice, the removal of refuse and any other privilege or facility connected with the use or occupancy of housing accommodations.

(8) The term "landlord" includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations, or an agent of any of the foregoing.

(9) The term "tenant" includes a subtenant, lessee, sublessee, or other person entitled to the possession or to the use or occupancy of any housing accommodations.

(10) The term "rent" means the consideration, including any bonus, benefit, or gratuity, demanded or received for the use or occupancy of housing accommodations or for the transfer of a lease of such accommodations.

(11) The term "hotel" means any establishment generally recognized as such in its community, containing more than 50 rooms and used predominantly for transient occupancy.

(12) The term "rooming house" means, in addition to its customary usage, a building or portion of a building other than a hotel in which a furnished room or rooms not constituting an apartment are rented on a short time basis of daily, weekly, or monthly occupancy to more than two paying tenants not members of the landlord's immediate family. The term includes boarding houses, dormitories, auto camps, trailers, residence clubs, tourist homes or cabins, and all other establishments of a similar nature.

(b) Unless the context otherwise requires, the definitions set forth in section 302 of the Emergency Price Control Act of 1942 shall apply to other terms used in this Maximum Rent Regulation.

SECTION 14. Effective date of the regulation.—This Maximum Rent Regulation shall become effective [insert effective date].

Issued [insert date of issuance].

PRENTISS M. BROWN,
Administrator.

UNITED STATES OF AMERICA
OFFICE OF PRICE ADMINISTRATION
WASHINGTON, D. C.

Revised PROCEDURAL REGULATION
No. 3

AS AMENDED TO JULY 1, 1943

REVISED PROCEDURAL REGULATION 3¹

AS AMENDED TO JULY 1, 1943

Procedure for Adjustments, Amendments, Protests and Interpretations Under Rent Regulations

Pursuant to the authority of sections 201 (d) and 203 (a) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong.), Procedural Regulation No. 3—Procedure for the Protest and Amendment of Maximum Rent Regulations and Adjustment Under Such Regulations—is hereby revoked, except as provided in § 1300.253 of this regulation, and the following rules are prescribed for adjustments, amendments, protests and interpretations under maximum rent regulations.

See:

1300.201 Purposes of this regulation.

SUBPART A—LANDLORDS' PETITIONS AND TENANTS' APPLICATIONS

- 1300.202 Right to file petition.
- 1300.203 Method of filing form, and contents.
- 1300.204 Joint petitions, consolidation.
- 1300.205 Tenants' applications.
- 1300.206 Investigation of petitions and applications.
- 1300.207 Action by rent director on his own initiative.
- 1300.208 Action by the rent director on petitions for adjustment or other relief.

APPLICATION FOR REVIEW OF RENT DIRECTOR'S ACTION

- 1300.209 Applications for review.
- 1300.210 Action on applications for review.

SUBPART B—PETITION FOR AMENDMENT

- 1300.211 Right to file petition.
- 1300.212 Time and place for filing petitions for amendment: Form and contents.
- 1300.213 Joint petitions for amendment.
- 1300.214 Action by the Administrator on petition.

SUBPART C—PROTESTS

- 1300.215 Right to protest.
- 1300.216 Time and place for filing protests.
- 1300.217 Form of protest.
- 1300.218 Assignment of docket number.

¹ Published in Federal Register, 8 F.R. 526, 1798, 3534, 5481.

Sec.

- 1300.219 Contents of protest.
- 1300.220 Affidavits or other written evidence in support of protest.
- 1300.221 Submission of brief by protestant.
- 1300.222 Joint protests.
- 1300.223 Amendment of protest and presentation of supplemental evidence.
- 1300.224 Protest and evidential material not conforming to this regulation.
- 1300.225 Action by the Administrator on protest.
- 1300.226 Statements in support of maximum rent regulation or order.
- 1300.227 Inclusion of material in the record by the Administrator.
- 1300.228 Consolidation of protests.

ORAL HEARINGS

- 1300.229 Requests for oral hearing.
- 1300.230 Conference prior to oral hearing.
- 1300.231 Continuance or adjournment of oral hearing.
- 1300.232 Conduct of the oral hearing.
- 1300.233 Filing of briefs.
- 1300.234 Subpoenas.
- 1300.235 Witnesses.
- 1300.236 Contemptuous conduct.
- 1300.237 Stenographic report of oral hearing.

OPINION AND TRANSCRIPT ON PROTESTS

- 1300.238 Opinion denying protest in whole or in part.
- 1300.239 Treatment of protest as petition for amendment or for adjustment or other relief.
- 1300.240 Transcript for judicial review.

SUBPART D—INTERPRETATIONS

- 1300.241 Interpretations.
- 1300.242 Requests for interpretations: Form and contents.
- 1300.243 Interpretation to be written: Authorized officials.
- 1300.244 Revocation or modification of interpretations.

SUBPART E—MISCELLANEOUS PROVISIONS AND DEFINITIONS

- 1300.245 Filing of notices, etc.
- 1300.246 Service of papers.
- 1300.247 Action by representative.
- 1300.248 Secretary: Office hours.
- 1300.249 Confidential information, inspection of documents filed with Secretary.
- 1300.250 Former employee not to be representative.
- 1300.251 Definitions.
- 1300.252 Amendment of this regulation.
- 1300.253 Effective date of Revised Procedural Regulation No. 3.

AUTHORITY: §§ 1300.201 to 1300.253, inclusive, issued under Pub. Law 42, 77th Cong.

§ 1300.201. Purposes of this regulation.—It is the purpose of this regulation to prescribe and explain the procedure of the Office of Price Administration in making various kinds of determinations in connection with the establishment of maximum rents.

(a) Subpart A deals with petitions for adjustment and other relief, provided for by the maximum rent regulations. An adjustment in maximum rent or any other relief can be granted only if the applicable maximum rent regulation contains specific provision for the adjustment or other relief sought.

(b) Subpart B deals with petitions for amendment. A petition for amendment is the appropriate document to file when a petitioner seeks a change of general applicability in the provisions of a maximum rent regulation.

(c) Subpart C deals with protests. A protest is the means provided by the Emergency Price Control Act of 1942 for making a formal claim that a maximum rent regulation or an order issued thereunder is in some respect invalid. Only if a protest has been filed and denied may the protestant file a complaint with the Emergency Court of Appeals to have the maximum rent regulation or order protested, enjoined or set aside in whole or in part.

(d) Subpart D explains the way in which interpretations of the meaning or effect of provisions of maximum rent regulations are given by officers or employees of the Office of Price Administration.

(e) Subpart E contains miscellaneous provisions, and definitions.

SUBPART A—LANDLORDS' PETITIONS AND TENANTS' APPLICATIONS

§ 1300.202. *Right to file petition.*—A petition for adjustment or other relief may be filed by any landlord subject to any provision of a maximum rent regulation who requests such adjustment or relief pursuant to a provision of the maximum rent regulation authorizing such action.

§ 1300.203. *Method of filing, form, and contents.*—A petition for adjustment or other relief provided for by a maximum rent regulation shall be filed with the rent director of the Office of Price Administration for the defense-rental area within which the housing accommodations involved are located. Petitions shall be filed upon forms prescribed by the Administrator and pursuant to instructions stated on such forms and may be accompanied by affidavits or other documents setting forth the evidence upon which the petitioner relies in support of the facts alleged in his petition.

§ 1300.204. *Joint petitions, consolidation.*—Two or more landlords may file a joint petition for adjustment or other relief where the grounds of the petition are common to all landlords joining therein. A joint petition shall be filed and determined in accordance with the rules governing the filing and determination of petitions filed by one landlord. A landlord's petition may include as many housing accommodations as present common questions which can be expeditiously

determined in one proceeding. Whenever the rent director deems it necessary or appropriate, he may order the filing of separate petitions or he may consolidate separate petitions presenting common questions which can be determined expeditiously in one proceeding.

§ 1300.205. Tenants' applications.—All tenants' applications provided for by any maximum rent regulation shall be filed with the rent director for the defense-rental area within which the housing accommodations involved are located. The application shall be filed on forms prescribed by the Administrator and pursuant to directions set forth on such forms. Action upon any tenant's application shall be within the discretion of the rent director and the procedure thereon shall be the same as in proceedings initiated by the rent director pursuant to provisions of a maximum rent regulation authorizing such action.

§ 1300.206. Investigation of petitions and applications.—Upon the filing of a petition or application pursuant to the provisions of this regulation, the rent director may make such investigation of the facts involved in the petition or application, hold such conferences, and require the filing of such reports, evidence in affidavit form or other material relevant to the proceeding, as he may deem necessary or appropriate for the proper disposition of the petition or application.

§ 1300.207. Action by rent director on his own initiative.—In any case where the rent director pursuant to the provisions of a maximum rent regulation, deems it necessary or appropriate to enter an order on his own initiative, he shall before taking such action, serve a notice upon the landlord of the housing accommodations involved stating the proposed action and the grounds therefor.

§ 1300.208. Action by the rent director on petitions for adjustment or other relief.—(a) Upon receipt of a petition for adjustment or other relief, and after due consideration, the rent director may either:

(1) Dismiss any petition which fails substantially to comply with the provisions of the applicable maximum rent regulation or of this regulation; or

(2) Grant or deny in whole or in part, any petition which is properly pending before him; or

(3) Notice such petition for oral hearing to be held in accordance with §§ 1300.229 to 1300.237, inclusive, of this regulation; or

(4) Provide an opportunity to present further evidence in affidavit form, in connection with such petition.

(b) An order entered by a rent director upon a petition for adjustment or other relief, or an order entered by a rent director on his own initiative, shall be effective and binding until changed by further order and shall be final subject only to application for review or pro-

test as provided in §§ 1300.209 and 1300.210 and §§ 1300.215 to 1300.228, inclusive, of this regulation. An order entered by a rent director may be revoked or modified at any time upon due notice to the petitioner.

APPLICATION FOR REVIEW OF RENT DIRECTOR'S ACTION

§ 1300.209. *Applications for review.*—(a) Any landlord whose petition for adjustment or other relief has been dismissed or denied in whole or in part by the rent director, or any landlord subject to an order entered by the rent director on his own initiative, may within a period of sixty days after the date of issuance of such determination, regardless of the effective date thereof, file with the rent director an application for review of such determination by the regional administrator for the region in which the defense-rental area office is located: *Provided*, That any landlord subject to an order entered under section 5 (d) of any maximum rent regulation or subject to an order entered by the rent director under § 1300.207 of this regulation, may either apply for review of such order as provided in this section, or may protest any provision of such order as provided in §§ 1300.215 to 1300.223, inclusive, of this regulation. An application for review shall be filed in triplicate upon forms prescribed by the Administrator and pursuant to instructions stated on such forms. Upon the filing of an application for review of such determination, the rent director shall forward the record of the proceedings with respect to which such application is filed to the appropriate regional administrator.

(b) Applications for review shall be deemed filed on the date received by the rent director: *Provided*, That applications for review properly addressed to the rent director, bearing a postmark dated within the sixty-day period specified above, but received after the expiration thereof, shall be deemed to have been filed on the date of the postmark.

§ 1300.210. *Action on applications for review.*—Upon the filing of an application for review in accordance with § 1300.209 of this regulation, and after due consideration, the regional administrator may affirm, revoke, or modify, in whole or in part, the determination of the rent director sought to be reviewed and may enter such order as is necessary or proper. In any case where an application for review does not conform in a substantial respect to the requirements of this regulation, the regional administrator may dismiss such application. An order entered by a regional administrator upon an application for review shall be effective and binding until changed by further

order and shall be final subject only to protest as provided in §§ 1300.215 to 1300.228, inclusive, of this regulation. An order entered by a regional administrator upon an application for review may be revoked or modified at any time upon due notice to the applicant.

SUBPART B—PETITION FOR AMENDMENT

§ 1300.211. *Right to file petition.*—A petition for amendment may be filed at any time by any person subject to or affected by a provision of a maximum rent regulation. A petition for amendment shall propose an amendment of general applicability and shall be granted or denied on the merits of the amendment proposed. The denial of a petition for amendment is not subject to protest or judicial review under the Act.

§ 1300.212. *Place for filing petitions for amendment; form and contents.*—A petition for amendment shall be filed with the Secretary, Office of Price Administration, Washington, D. C. One original and four copies of the petition and of all accompanying documents and briefs shall be filed. Each copy shall be printed, typewritten, mimeographed, or prepared by a similar process, and shall be plainly legible. Copies shall be double spaced, except that quotations shall be single spaced and indented. Every such petition shall be designated "Petition for Amendment" and shall contain, upon the first page thereof, the name of the defense-rental area and the number and date of issuance of the maximum rent regulation to which the petition relates, and the name and address of the petitioner. The petition shall specify the manner in which the petitioner is subject to or affected by the provision of the maximum rent regulation involved, and shall include a specific statement of the particular amendment desired and the facts which make that amendment necessary or appropriate. The petition shall be accompanied by affidavits setting forth the evidence upon which the petitioner relies in his petition.

§ 1300.213. *Joint petitions for amendment.*—Two or more persons may file a joint petition for amendment, where the amendments proposed are identical or substantially similar. Joint petitions shall be filed and determined in accordance with the rules governing the filing and determination of petitions filed by one person. Whenever the Administrator deems it to be necessary or appropriate for the disposition of joint petitions, he may treat such joint petitions as several, and, in any event, he may require the filing of relevant material by each individual petitioner.

§ 1300.214. *Action by the Administrator on petition.*—In the consideration of any petition for amendment, the Administrator may

afford to the petitioner and to other persons likely to have information bearing upon such proposed amendment, or likely to be affected thereby, an opportunity to present evidence or argument in support of, or in opposition to, such proposed amendment. Whenever necessary or appropriate for the full and expeditious determination of common questions raised by two or more petitions for amendment, the Administrator may consolidate such petitions.

SUBPART C—PROTESTS

§ 1300.215. Right to protest.—Any landlord subject to any provision of a maximum rent regulation, or of an order issued under § 1300.210 of this regulation, or of an order entered under section 5 (d) of any maximum rent regulation, or of an order entered by the rent director under § 1300.207 of this regulation, may file a protest in the manner set forth below. A landlord is, for the purposes of this regulation, subject to a provision of a maximum rent regulation or of an order only if such provision prohibits or requires action by him. Any protest filed by a landlord not subject to the provision protested, or otherwise not in accordance with the requirements of this regulation, may be dismissed by the Administrator.

§ 1300.216. Time and place for filing protests.—(a) Any protest as provided in § 1300.215 of this regulation against a provision of a maximum rent regulation or an order, shall be filed with the Secretary, Office of Price Administration, Washington, D. C., within a period of sixty days after the date of issuance of such regulation or order, regardless of the effective date thereof: *Provided*, That a protest against a provision of a maximum rent regulation based solely on grounds arising after the date of issuance of such maximum rent regulation shall be filed within a period of sixty days after the protestant has had, or could reasonably have had, notice of the existence of such grounds.

(b) Protests shall be deemed filed on the date received by the Secretary, Office of Price Administration, Washington, D. C.: *Provided*, That protests properly addressed to the Secretary bearing a postmark dated within the applicable sixty-day period specified above, but received after the expiration thereof, shall be deemed to have been filed on the date of the postmark.

§ 1300.217 Form of protest.—Every protest shall be clearly designated a "Protest" and shall contain, upon the first page thereof, (a) the name of the protestant and of the defense-rental area for which the maximum rent regulation or order protested was issued, (b) a statement whether the protest is against a maximum rent regula-

tion or order, and (c) the date of issuance and the number of such maximum rent regulation or order. One original and five copies of the protest and of all accompanying documents and briefs shall be filed. Each copy shall be printed, typewritten, mimeographed or prepared by a similar process, and should be plainly legible. Copies shall be double spaced, except that quotations shall be single spaced and indented.

§ 1300.218. Assignment of docket number.—Upon receipt of a protest it shall be assigned a docket number, of which the protestant shall be notified, and all further papers filed in the proceedings shall contain on the first page thereof the docket number so assigned and the information specified in § 1300.217 of this regulation.

§ 1300.219. Contents of protest.—Every protest shall set forth the following:

(a) The name and the post office address of the protestant, the manner in which the protestant is subject to the provision of the maximum rent regulation or order protested, and the location, by post office address or otherwise, of all housing accommodations involved in the protest.

(b) The name and post office address of the person filing the protest on behalf of the protestant and the name and post office address of the person to whom all communications from the Office of Price Administration relating to the protest shall be sent.

(c) A clear and concise statement of all objections raised by the protestant against the provision of the maximum rent regulation or order protested, each such objection to be separately stated and numbered.

(d) A clear and concise statement of all facts alleged in support of the objections.

(e) A statement of the relief requested by the protestant including, if the protestant requests modification of a provision of the maximum rent regulation or order, the specific changes which he seeks to have made therein.

(f) In cases where the protest is based upon grounds arising after the date of issuance of the maximum rent regulation, a clear and concise statement of facts showing the time when such grounds arose.

(g) A statement signed and sworn to (or affirmed) by the protestant personally or, if a partnership, by a partner or if a corporation or association, by a duly authorized officer, that the protest and documents filed therewith are prepared in good faith and that the facts alleged are true to the best of his knowledge, information and belief. The protestant shall specify which of the facts are known to him to be true and which are alleged on information and belief.

§ 1300.220. Affidavits or other written evidence in support of protest.—Every protestant shall file together with his protest the following:

(a) Affidavits setting forth in full all the evidence, the presentation of which is subject to the control of the protestant, upon which the protestant relies in support of the facts alleged in the protest. Each such affidavit shall state the name, post office address, and occupation of the affiant; his business connection, if any, with the protestant; and whether the facts set forth in the affidavit are stated from personal knowledge or on information and belief. In every instance, the affiant shall state in detail the sources of his information: *Provided*, That on a protest of an order, the evidence and all documents in proceedings had in connection therewith, shall be a part of the record on protest and need not be filed by the protestant.

(b) A statement by the protestant in affidavit form setting forth in detail the nature and sources of any further evidence, not subject to his control, upon which he believes he can rely in support of the facts alleged in his protest.

(c) If necessary, a further statement by the protestant in affidavit form setting forth the nature and sources of any evidence which the protestant is unable to present solely because of the time limit for the filing of protests and supporting material. Such further statement may contain a request for an opportunity to present such further evidence, which request shall state specifically the amount of time needed for preparation of such evidence. Any affidavits providing further evidence, pursuant to order, shall contain the information required by subparagraph (a) of this section.

§ 1300.221. Submission of brief by protestant.—The protestant may file with his protest and accompanying evidential material a brief in support of the objections set forth in the protest. Such brief shall be submitted as a separate document, distinct from the protest and evidential material.

§ 1300.222. Joint protests.—Two or more landlords may file a joint protest. Joint protests shall be filed and determined in accordance with the rules governing the filing and determination of protests filed severally. A joint protest shall be verified in accordance with § 1300.219 (g) of this regulation by each protestant. A joint protest may be filed only where at least one ground is common to all persons joining in it. Whenever the Administrator deems it to be necessary or appropriate for the disposition of joint protests, he may treat such joint protests as several, and, in any event, he may require the filing of relevant materials by the individual protestants.

§ 1300.223. Amendment of protest and presentation of supplemental evidence.—(a) The protestant may amend his protest or his affidavits and briefs submitted therewith, or may add to such material within a period of sixty days after the issuance of the maximum rent regulation or order against a provision of which the protest is filed, or, in the case of a protest based solely on grounds arising after the date of issuance of a maximum rent regulation, within sixty days after the protestant has had or could reasonably have had notice of the existence of such grounds.

(b) After the time prescribed in paragraph (a) of this section, a protestant may be granted permission to amend his protest or to present further evidence in connection therewith, when, in the judgment of the Administrator, such permission will not unduly delay the completion of proceedings on the protest. No amendment which adds a new ground of protest will be permitted.

§ 1300.224. Protest and evidential material not conforming to this regulation.—In any case where a protest or accompanying evidential material does not conform, in a substantial respect, to the requirements of this regulation, the Administrator may dismiss such protest, or, in his discretion, may strike such evidential material from the record of the proceedings in connection with the protest. A protest against the provisions of an order entered under section 5 (d) of any maximum rent regulation or of an order entered by a rent director under § 1300.207 of this regulation may be dismissed where, prior to the filing of such protest, the landlord filed an application for review of such order as provided in § 1300.209 of this regulation.

§ 1300.225. Action by the administrator on protest.—(a) Within a reasonable time after the filing of any protest in accordance with this regulation, but in no event more than thirty days after such filing or ninety days after the issuance of the maximum rent regulation or order against a provision of which the protest is filed, whichever occurs later, the Administrator shall:

- (1) Grant or deny such protest in whole or in part; or
- (2) Notice such protest for oral hearing, to be held in accordance with the provisions of §§ 1300.229 to 1300.237, inclusive of this regulation; or
- (3) Provide an opportunity to present further evidence in connection with such protest. Before, or within a reasonable time after, the presentation of such further evidence, the Administrator may notice such protest for oral hearing in accordance with subparagraph (2) of this section, may include additional material in the record of the proceedings in connection with the protest in accordance with § 1300.226 of this regulation, or may take such other action as may be appropriate to the disposition of the protest.

(b) Notice of any such action taken by the Administrator shall promptly be served upon the protestant.

(c) Where the Administrator has ordered a hearing on a protest or has provided an opportunity for the presentation of further evidence in connection therewith, he shall, within a reasonable time after the completion of such hearing or the presentation of such evidence, grant or deny such protest in whole or in part.

§ 1300.226. Statements in support of maximum rent regulation or order.—(a) Any person affected by the provisions of a maximum rent regulation, or of an order issued thereunder, may at any time after the issuance of such regulation or order submit to the Administrator a statement in support of any such provisions. Such statement shall include the name and post office address of such person, the nature of his business, and the manner in which such person is affected by the maximum rent regulation or order in question, and may be accompanied by affidavits and other data. Each such supporting statement shall conform to the requirements of § 1300.220 of this regulation.

(b) In the event that a protest has been, or is subsequently, filed against a provision of a maximum rent regulation or order in support of which a statement has been submitted, the Administrator may include such statement in the record of the proceedings taken in connection with such protest. If such supporting statement is incorporated into the record, and is not so incorporated at an oral hearing, copies of such supporting statement shall be served upon the protestant, and the protestant shall be given a reasonable opportunity to present evidence in rebuttal thereof.

ORAL HEARINGS

§ 1300.227. Inclusion of material in the record by the Administrator.—The Administrator shall include in the record of the proceedings on the protest such evidence, in the form of affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. When such evidence is incorporated into the record, and is not so incorporated at an oral hearing, copies thereof shall be served upon the protestant, and the protestant shall be given a reasonable opportunity to present evidence in rebuttal thereof.

§ 1300.228. Consolidation of protests.—Whenever necessary or appropriate for the full and expeditious determination of common questions raised by two or more protests the Administrator may consolidate such protests.

§ 1300.229. Requests for oral hearing.—Any protestant, applicant, or petitioner may request an oral hearing. Such request shall be accompanied by a showing as to why the filing of affidavits or other

written evidence and briefs will not permit the fair and expeditious disposition of the protest, application for review, or petition. In the event that an oral hearing is ordered in connection with a protest, application for review, or petition, notice thereof shall be served on the protestant, applicant, or petitioner not less than five days prior to such hearing. The time and place of the hearing shall be stated in the notice. Any such oral hearing may be limited in such manner and to the extent deemed appropriate to the expeditious determination of the proceeding.

§ 1300.230. Conference prior to oral hearing.—At any time prior to the commencement of the oral hearing, the protestant, applicant, or petitioner may be requested to appear at a conference to consider (a) the simplification of issues; (b) the possibility of obtaining stipulations of fact which will avoid unnecessary proof; and (c) such other matters as may expedite the conduct of the oral hearing. No transcript of such conference shall be kept, but the officer authorized to conduct such conference shall incorporate in the record of the proceedings any written stipulations or agreements made at, or as a result of, the conference. If the circumstances are such that an oral conference is impracticable, such negotiations may be conducted by correspondence.

§ 1300.231. Continuance or adjournment of oral hearing.—The oral hearing shall be held at the time and place specified by the notice of hearing but may be continued or adjourned to a later day or to a different place. Notice of such adjournment or continuance may be by announcement at the oral hearing.

§ 1300.232. Conduct of the oral hearing.—(a) An oral hearing on a protest, application for review, or petition shall be conducted by the Administrator or such officer or employee of the Office of Price Administration (hereinafter referred to as the "presiding officer") as the Administrator may appoint or designate for that purpose. Any such appointment or designation may be made or revoked at any time.

(b) The oral hearing shall be conducted in such manner as will permit the protestant, applicant, or petitioner to present evidence and argument to the fullest extent compatible with expeditious decision of the issues. To this end:

(1) The rules of evidence prevailing in courts of law or equity shall not be controlling; and

(2) The presiding officer, having due regard to the need for expeditious decision and for fair treatment to the protestant, applicant, or petitioner, may restrict oral argument and the examination and cross-examination of witnesses: *Provided*, That in no event shall this section be construed to limit the right of the protestant, applicant, or petitioner to submit affidavits or other written evidence or arguments.

§ 1300.233. Filing of briefs.—The presiding officer shall allow the protestant, applicant, or petitioner to file briefs or written arguments within such time as he shall designate.

§ 1300.234. Subpoenas.—(a) Any protestant, applicant, or petitioner may apply for a subpoena in connection with an oral hearing. Applications for subpoenas when made prior to the oral hearing shall be filed as follows: (1) in connection with a protest against a provision of a maximum rent regulation or order, with the Secretary, Office of Price Administration, Washington, D. C.; (2) in connection with a proceeding under §§ 1300.207 to 1300.210, inclusive, of this regulation, with the rent director or regional administrator, as the case may be, before whom such proceeding is pending. The Administrator may grant or deny an application for a subpoena or refer it to the presiding officer appointed or designated under § 1300.232 who may thereafter grant or deny the application. Applications for subpoenas made during the oral hearing shall be submitted to the presiding officer, who may grant or deny such application.

(b) All applications for subpoenas shall specify the name of the witness and the nature of the facts to be proved by him and, if calling for the production of documents, shall specify them with such particularity as will enable them to be identified for purposes of production.

(c) Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees and mileage specified in section 202 (f) of the act. When the subpoena is issued at the instance of the Administrator, fees and mileage need not be tendered.

§ 1300.235. Witnesses.—Witnesses summoned before the presiding officer at any hearing shall be paid the fees and mileage specified by section 202 (f) of the Act. Witness fees and mileage shall be paid by the person at whose instance the witness appears.

§ 1300.236. Contemptuous conduct.—Contemptuous conduct at any oral hearing shall be ground for exclusion from the hearing. The refusal of a witness to answer any question which has been ruled to be proper shall, in the discretion of the presiding officer, be ground for the striking out of all testimony previously given by such witness on related matters.

§ 1300.237. Stenographic report of oral hearing.—A stenographic report of the oral hearing shall be made, a copy of which shall be available for inspection during business hours in the office of the Secretary, Office of Price Administration, Washington, D. C., or in the appropriate regional office or defense-rental area office.

OPINION AND TRANSCRIPT ON PROTESTS

§ 1300.238. *Opinion denying protest in whole or in part.*—In the event that the Administrator denies any protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice. Any order entered in such protest proceedings shall be effective from the date of its issuance unless otherwise provided in such order.

§ 1300.239. *Treatment of protest as petition for amendment or for adjustment or other relief.*—Any protest filed against a provision of a maximum rent regulation may, in the discretion of the Administrator, be treated not only as a protest but also as a petition for amendment of the regulation protested, or as a petition for adjustment or other relief pursuant thereto, when the facts produced in connection with the protest justify such treatment.

§ 1300.240. *Transcript for judicial review.*—The transcript for judicial review shall include:

- (a) The designation of the defense-rental area;
- (b) The rent declaration;
- (c) The maximum rent regulation or order against a provision of which the protest was filed;
- (d) The protest;
- (e) A statement setting forth, as far as practicable, the economic data and other facts of which the Administrator has taken official notice; and
- (f) Such other portions of the proceedings in connection with the protest as are material under the complaint.

SUBPART D—INTERPRETATIONS

§ 1300.241. *Interpretations.*—An interpretation given by an officer or employee of the Office of Price Administration with respect to any provision of the act or any maximum rent regulation or order thereunder, will be regarded by the Office of Price Administration as official only if such interpretation was requested and issued in accordance with §§ 1300.242 to 1300.244, inclusive, of this regulation. Action taken in reliance upon and in conformity with an official interpretation and prior to any revocation or modification thereof or to any superseding thereof by regulation, order or amendment, shall constitute action in good faith pursuant to the provision of the act, or of the regulation or order to which such official interpretation relates. An official interpretation shall be applicable only with re-

spect to the particular person to whom, and to the particular factual situation with respect to which, it is given unless issued as an interpretation of general applicability.

§ 1300.242 Requests for interpretations: Form and contents.—Any person desiring an official interpretation of the Emergency Price Control Act of 1942, or of any maximum rent regulation or order thereunder, shall make a request in writing for such interpretation. Such request shall set forth in full the factual situation out of which the interpretative question arises and shall, so far as practicable, state the names and post office addresses of the persons and the location of the housing accommodations involved. If the inquirer has previously requested an interpretation on the same or substantially the same facts, his request shall so indicate and shall state the official or office to whom his previous request was addressed. No interpretation shall be requested or given with respect to any hypothetical situation or in response to any hypothetical question.

§ 1300.243 Interpretation to be written: Authorized officials.—Official interpretations shall be given only in writing, signed by one of the following officers of the Office of Price Administration: the Administrator, the general counsel, any associate or assistant general counsel; any regional attorney, any regional rent attorney, any chief attorney for a State or district or defense-rental area office, and any district rent attorney: *Provided*, That interpretations of general applicability shall be given only by the Administrator, the general counsel, or any associate or assistant general counsel.

§ 1300.244 Revocation or modification of interpretations.—Any official interpretation, whether of general applicability or otherwise, may be revoked or modified by a publicly announced statement by any official authorized to give interpretations of general applicability or by a statement or notice by the Administrator or general counsel published in the Federal Register. An official interpretation addressed to a particular person may also be revoked or modified at any time by a statement in writing mailed to such person and signed by the general counsel or any associate or assistant general counsel. An official interpretation addressed to a particular person by a regional attorney, a regional rent attorney, or a chief rent attorney for a defense-rental area office may also be revoked or modified at any time by a statement in writing mailed to such person and signed by the attorney who issued it or by his successor.

SUBPART E—MISCELLANEOUS PROVISIONS AND DEFINITIONS

§ 1300.245 Filing of notices, etc.—All notices, reports, registration statements and other documents which a landlord is required to file pursuant to the provisions of any maximum rent regulation shall be filed with the appropriate defense-rental area office, unless otherwise provided in such maximum rent regulation or in this regulation.

§ 1300.246 Service of papers.—Notices, orders and other process and papers may be served personally or by leaving a copy thereof at the residence or principal office or place of business of the person to be served, or by mail, or by telegraph. When service is made personally or by leaving a copy at the residence or principal office or place of business, the verified return of the person serving or leaving the copy shall be proof of service. When service is by registered mail or telegraph the return post office receipt or telegraph receipt shall be proof of service. When service is by unregistered mail, an affidavit that the document has been mailed shall be proof of service.

§ 1300.247. Action by representative.—Any action which by this regulation is required of, or permitted to be taken by a landlord may, unless otherwise expressly stated, be taken on his behalf by any person whom the landlord has by written power of attorney authorized to represent him. Such power of attorney, signed by the landlord, shall be filed at the time such action on his behalf is taken.

§ 1300.248. Secretary: Office hours.—The office of the Secretary, Office of Price Administration, Washington, D. C., shall be open every day except Sunday from 9 a. m. until 5 p. m. Any person desiring to file any papers, or to inspect any documents filed with such office at any time other than the regular office hours stated, may file a written application with the Secretary, requesting permission therefor.

§ 1300.249. Confidential information, inspection of documents filed with Secretary.—Protests and all papers filed by protestants in connection therewith are public records, open to inspection in the office of the Secretary upon such reasonable conditions as the Secretary may prescribe. Except as provided above, confidential information filed with the Office of Price Administration will not be disclosed, unless the Administrator determines the withholding thereof to be contrary to the interests of the national defense and security.

§ 1300.250. Former employees not to be representative.—No former officer or employee of the Office of Price Administration shall, within two years after the termination of his employment, be permitted to act as agent, attorney, or representative of any person in connection with any protest, petition for amendment, application for review,

petition for adjustment or other relief or other proceeding before the Office of Price Administration: *Provided*, That this provision shall not be construed to prohibit a person who performs services for the Office of Price Administration without pay, or as a part-time employee, from acting as such agent, attorney, or representative in a matter which was not pending before the Office of Price Administration during the period of employment of such person.

§ 1300.251. *Definitions*.—As used in this regulation, unless the context otherwise requires, the terms:

(a) "Act" means the Emergency Price Control Act of 1942 (Public Law 421, 77th Cong.).

(b) "Administrator" means the Price Administrator of the Office of Price Administration or such person or persons as he may appoint or designate to carry out any of the duties delegated to him by the Act.

(c) "FEDERAL REGISTER" means the publication provided for by the Act of July 26, 1935 (49 Stat. 500), as amended.

(d) "Maximum rent regulation" means any regulation establishing a maximum rent.

(e) "Maximum rent" means the maximum rent established by any maximum rent regulation or order for the use of housing accommodations within any defense-rental area.

(f) "Date of issuance," with respect to a maximum rent regulation, means the date on which such maximum rent regulation is filed with the Division of the Federal Register.

(g) "Person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing.

(h) "Protestant" means a person subject to any provision of a maximum rent regulation or order who files a protest in accordance with Section 203 (a) of the Act.

(i) "Landlord" includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy or any housing accommodations, or an agent of any of the foregoing.

(j) "Tenant" includes a subtenant, lessee, sublessee, or other person entitled to the possession or to the use or occupancy of any housing accommodations.

(k) "Housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, together with all privileges, services, furnishing, furniture, equipment,

facilities and improvements connected with the use or occupancy of such property.

(l) "Defense-rental area" means the District of Columbia and any area designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of the Act.

(m) "Rent director" means the person designated by the Administrator as director of any defense-rental area or such person or persons as may be designated to carry out any of the duties delegated to the rent director by the Administrator.

(n) "Regional administrator" means the person designated by the Administrator as administrator of any regional office established by the Office of Price Administration or such person or persons as may be designated to carry out any of the duties delegated to the regional administrator by the Administrator.

§ 1300.252. Amendment of this regulation.—Any provision of this regulation may be amended or revoked by the Administrator at any time. Such amendment or revocation shall be published in the **FEDERAL REGISTER** and shall take effect upon the date of its publication, unless otherwise specified therein.

§ 1300.253. Effective date of Revised Procedural Regulation No. 3.—Sections 1300.209 and 1300.210 of this regulation are applicable to petitions for adjustment or other relief which are denied in whole or in part by the rent director, or to orders entered by the rent director pursuant to § 1300.207 of this regulation, on or after the effective date of this regulation. Protests against such denials or orders entered prior to February 1, 1943, shall be filed and acted upon pursuant to the applicable provisions of Procedural Regulation No. 3 as heretofore and such provisions are continued in effect for this purpose except that such protests properly addressed to the appropriate Regional Office, bearing a postmark dated within the applicable sixty-day period specified in Procedural Regulation No. 3 but received after the expiration thereof, shall be deemed to have been filed on the date of the postmark. This regulation shall become effective February 1, 1943.

Issued this 12th day of January 1943.

LEON HENDERSON,
Administrator.

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DEC 30 1943

CHARLES ELMORE DROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

CHESTER BOWLES, Administrator,
Office of Price Administration,
Appellant,

vs.

MRS. KATE C. WILLINGHAM and
J. R. HICKS, JR.,

Appellees.

No. 464.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

CHESTER BOWLES, Administrator,
Office of Price Administration,
Appellant,
vs.
MRS. KATE C. WILLINGHAM and
J. R. HICKS, JR.,
Appellees.

No. 464.

BRIEF OF COUNSEL FOR APPELLEES.

STATEMENT OF THE CASE.

We realize that under Rule 27 (4) of this Court we need make no statement of the case beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side. However, as we conclude the preparation of this brief, we have not been served with the brief of the appellant, so we must make a fairly full statement of the case.

On July 14, 1943, Mrs. Willingham presented to one of the Judges of the Superior Court of Bibb County, Georgia

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(Tr. p. 9), her petition for injunction. Andrew Lyndon, as Rent Director of the Macon, Georgia, Defense Rental Area, was named as defendant.

In May of 1941 she had purchased a certain housing accommodation in the City of Macon, which City was a part of the Macon, Georgia, Defense Rental Area. Upon purchasing the property, she, prior to July 1, 1942, changed it so as to result in an increase in the number of dwelling units therein. On January 30, 1942, the Congress passed the Emergency Price Control Act (U. S. C. A., Title 50, App., Sections 901 et seq.). On April 28, 1942, the Price Administrator issued a declaration under this Act as to the Macon, Georgia, Defense Rental Area, and on June 30, 1942, issued Maximum Rent Regulation Number 26, establishing maximum rents for housing accommodations, freezing rents, generally speaking, as of April 1, 1941. However, her property was not rented on April 1, 1941, and therefore its rentals were governed by other provisions of the regulation which permitted her to charge the first rents she received for the housing accommodations prior to July 1st, 1942, subject to reduction by the Administrator as provided in Section 5 (c) of the Regulation:

"The Administrator, at any time on his own initiative, or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that: (1) The maximum rent for housing accommodations under paragraphs (e), (d), or (g) of Section 4 is higher than the rent generally prevailing in the defense rental area for comparable housing accommodations on April 1st, 1941"

(Fed. Reg., Vol. 7, page 4907.)

Her situation fell under paragraph (d) of Section 4 of the Regulation (Fed. Reg., Vol. 7, page 4906), having been changed between April 1, 1941, and July 1, 1942, so as to result in an increase of the number of dwellings therein.

After the housing accommodations had been so changed, she, in the summer of 1941, rented them at certain specified rentals which the tenants agreed to pay and did pay.

On June 14, 1943, the defendant served her with a so-called "notice to landlord of proceedings on Rent Director's initiative," in which he set out that he proposed to reduce these rentals, and gave her the opportunity to file objections to the proposed action. She furnished evidence, but at the time of the filing of her suit no orders had been issued. She charged that she would have no complete and adequate remedy at law after the Rent Director issued the orders, but that she must comply with them at the risk of heavy penalties, civil and criminal.

She charged that Section 5 (c) of the Rent Regulation was unconstitutional and that Section 2B of the Emergency Price Control Act [U. S. C. A., Title 50, App., Section 902 (b)] was unconstitutional. She charged that the defendant was without legal authority to interfere with her contractual relationships with her tenants and without legal authority to issue the proposed order.

She prayed that the defendant be enjoined from issuing any order reducing the rents on the housing accommodations, and for such other and further relief as might seem meet and proper.

The Judge of the State Court on July 14th, 1943, issued an ex parte restraining order, restraining the defendant from issuing such order (Tr., page 16). The defendant was ordered to show cause on September 6, 1943, why he should not be enjoined.

In that situation, on July 20th, 1943, Brentiss M. Brown, Administrator of the Office of Price Administration, filed his complaint in the District Court of the United States for the Macon Division of the Middle District of Georgia, against Mrs. Willingham and J. R. Hicks, as Sheriff of Bibb County. He charged that Mrs. Willingham had engaged in acts and practices which constituted violations of

the Emergency Price Control Act by filing the bill in the State Court and procuring the restraining order. He charged that the order and judgment of the Superior Court of Bibb County, Georgia, was utterly void for that that Court was without jurisdiction to entertain the petition upon which it was based, or to issue the order, the State Court having been divested of such jurisdiction by the terms of the Emergency Price Control Act of 1942, and particularly Section 204 (d) thereof. [Section 204 (d) is U. S. C. A., Title 50, App., Section 924 (d), page 327.] (Tr., pages 1-4.)

He prayed that Mrs. Willingham and all persons in active concert or participation with her be enjoined from further prosecution of the State Court proceedings, and that the defendant Hicks be enjoined from serving the order or any subsequent orders entered in the State Court proceedings. A rule nisi was issued by Judge Lovett, and properly served.

Later, in an amendment to this complaint, the Price Administrator set up that he brought his action pursuant to Section 205 (a) of the Act [U. S. C. A., Title 50, App., Section 925 (a)], and pursuant to his right as an officer of the United States authorized to sue, and to effectuate the public policy of a statute of the United States.

Jurisdiction of the District Court was invoked under Section 205 of the Act and under Title 28, U. S. C. A., Section 41 (1).

Mrs. Willingham filed her defensive pleadings in the Federal Court and an amendment thereto in which she averred:

- (a) An injunction should not be granted against her for the reason that such grant would be violative of Section 265 of the Judicial Code (U. S. C. A., Title 28, Section 378).
- (b) She had not engaged in acts and practices constituting violations or attempted violations of the Price Control

Act, but had simply asserted her rights as a citizen in the State Courts of Georgia to test the validity of the Emergency Price Control Act;

(c) Section 5 (e) (1) of the Rent Regulation Number 26 was unconstitutional and void;

(d) Section 204 (d) of the Emergency Price Control Act, seeking to divest the Superior Court of Bibb County of jurisdiction to determine the validity of the Regulation and the Act, was beyond any constitutional power of the Congress and that section is therefore unconstitutional and void under Article VI of the Constitution;

(e) Section 2 (B) of the Act was unconstitutional and void;

(f) If the Rent Director were to issue the proposed order, such order would be unconstitutional and void for that the Congress had not delegated to the "Rent Director" the power which he sought to exercise, and the Act of the Price Administrator in seeking to delegate that power to the Rent Director was unconstitutional and void.

The case was heard on the appellees' motion to dismiss the action. The motion was sustained on the ground that the rent provisions of the Price Control Act and the regulations promulgated pursuant thereto were unconstitutional and invalid (Tr., page 26).

This order was amended by the Court stating that it did not deem it necessary to decide and did not decide whether Section 204 (d) of the Act was constitutional in so far as it operates or might operate to restrict the jurisdiction of the State Court in the case of Mrs. Willingham against the Rent Director (Tr., page 39).

An appeal was allowed by the District Judge (Tr., page 41). Your Honors have noted probable jurisdiction (Tr., page 45).

POINTS OF LAW.

We think that under the assignments of error (Tr., pages 41-42) and the pleadings in the District Court, the following points of law are involved:

1. The District Court, if it had jurisdiction of the case at all, had jurisdiction to determine the constitutionality and validity of the Emergency Price Control Act, Maximum Rent Regulation Number 26, and all contemplated orders thereunder;
2. The Rent Control Sections of the Emergency Price Control Act are unconstitutional and void, being violative:
 - (a) of Article I, Section 1, of the Constitution of the United States, and,
 - (b) of the Fifth Amendment to the Constitution of the United States;
3. Even if the Act should be held to be valid, Section 5 (c) of Maximum Rent Regulation Number 26 is unconstitutional and void;
4. By reason of the provisions of Section 265 of the Judicial Code (U. S. C. A., Title 28, Section 379), the District Court of the United States for the Middle District of Georgia had no jurisdiction to grant the writ of injunction to stay the proceedings filed by appellee, Mrs. Willingham, in the Superior Court of Bibb County, Georgia;
5. The provisions of Section 204 (d) of the Emergency Price Control Act, purporting to divest the Superior Court of Bibb County, Georgia, of jurisdiction and power to consider the validity of a Rent Regulation or to stay, restrain, enjoin, or set aside any provision of the Act or any regulation or order issued thereunder, are unconstitutional and void;
6. The proposed order of the Rent Director would have been unconstitutional and void, but appellee would have been forced to obey it.

The District Court, If It Had Jurisdiction of the Case at All, Had Jurisdiction to Determine the Constitutionality and Validity of the Emergency Price Control Act, Maximum Rent Regulation Number 26, and All Contemplated Orders Thereunder.

This question arises by reason of provisions of Sections 204 (d) of the Emergency Price Control Act [U. S. C. A., Title 50, App., Section 924 (d), page 327]. Those provisions are:

“The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2 (Section 902, U. S. C. A., Title 30, App.), * * * and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulation or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.”

In his original complaint in the Federal District Court the appellant asserted:

“Jurisdiction of this action is conferred upon the Court by Section 205 of the Act, as well as the general equity jurisdiction of this Honorable Court” (Tr., page 2, paragraph 3).

Section 205 of the Act is found in U. S. C. A., Appendix, as Section 925, Title 50, and is in part:

“Whenever in the judgment of the Administrator any person has engaged or is about to engage in any

acts or practices which constitute or will constitute a violation of any provision of Section 4 of this Act (Section 904 of this Appendix), he may make application to the appropriate Court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

That section further provides in subsection (e) thereof:

"The District Court shall have jurisdiction . . . of all other proceedings under Section 205 of this Act . . ." [U. S. C. A., Title 50, App., Section 925 (e), page 342].

The Act further defines the term "District Court" as meaning, among other definitions, any District Court of the United States [U. S. C. A., Title 50, App., Section 942 (k), page 350].

The appellant amended this paragraph of his complaint by adding thereto:

"as provided in Title 28, U. S. C. A., Section 41 (1)." (Tr., page 7).

Section 41(1) of Title 28, U. S. C. A., provides that the District Courts shall have jurisdiction of all suits of a civil nature brought by any officer of the United States authorized to sue.

Therefore, jurisdiction to entertain this action emanated from acts of Congress. But the inherent right of a Court to declare acts of Congress unconstitutional does not emanate from any act of Congress. That power has its source in the supremacy clause of the Constitution of the United States, which provides:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land . . ." (Constitution, Article VI, Par. 2.)

The judicial power of the United States is vested in the Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish (Constitution, Article III, Section 1).

We recognize perfectly the rule that a District Court can entertain only such cases as Congress gives it jurisdiction to try. Jurisdiction to try any case or class of cases may be altogether withheld. But the Congress has not withheld jurisdiction to try this case. On the contrary, the appellant contends that the Emergency Price Control Act expressly confers power upon the District Court to try it. The appellant contends that the District Court had jurisdiction to entertain his bill under the provisions of the Judiciary Act [U. S. C. A., Title 28, Section 41 (1)]. Subject to certain limitations, we accept his contention.

So, as the District Judge well said in his opinion (Tr., pages 27-28):

"If Congress prohibits an inferior Court from trying a case, the Court cannot entertain it and, if Congress confers jurisdiction to try a case, the Court cannot refuse to accept jurisdiction. It is bound to hear and decide the case. But, having directed the Court to try the case, Congress has no authority also to direct the Court to render judgment in accordance with the terms of a void act in disregard of the supreme law of the land. The distinction is that, while Congress can determine what cases a Court can try, it cannot direct what law shall control the decision."

The able and learned Judge might have gone further. He might well have pointed out that under the Supremacy

Clause of the Constitution, not all laws of the United States are, next to the Constitution, supreme. Only those laws are supreme which shall be made in pursuance of the Constitution.

"It is to be observed, that the Supreme Court had the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the Constitution. This power they will hold under the Constitution, and independent of the Legislature. The latter can no more deprive the former of this right, than either of them, or both of them together, can take from the President, with the advice and consent of the Senate, the power of making treaties, or appointing ambassadors.

"In determining these questions, the Court must and will assume certain principles from which they will reason, in forming their decisions. These principles, whatever they may be, when they become fixed, by a course of decisions, will be adopted by the Legislature, and will be the rule by which they will explain their powers. This appears evident from this consideration, that if the Legislature pass laws, which, in the judgment of the Court, they are not authorized to do by the Constitution, the Court will not take notice of them; for it will not be denied that the Constitution is the highest or supreme law. And the Courts are vested with the supreme and uncontrollable power to determine in all cases that come before them, what the Constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the Constitution, unless we can suppose they can make a superior law give way to an inferior."

Brutus on Judicial Review, quoted by Edward S. Corwin, in "Court Over Constitution," page 244. (Emphasis ours.)

"The Legislature can exercise only such powers as are given them by the Constitution, they cannot assume any of the rights annexed to the judicial, for

this plain reason, that the same authority which vested the Legislature with their powers, vested the judicial with theirs—both are derived from the same source, both therefore are equally valid, and the judicial hold their powers independently of the Legislature, as the Legislature do of the judicial. . . . The Supreme Court then have a right, independent of the Legislature, to give a construction to the Constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the Legislature pass any laws, inconsistent with the sense the Judges put upon the Constitution, they will declare it void; and therefore in this respect their power is superior to that of the Legislature. . . .”

(*Ibid*, pages 257, 258.)

It is no answer to this argument to say that the Supreme Court could declare an unconstitutional Act void, and that that Court could not be deprived of such power by the Congress. For, as Judge Deaver points out:

“‘Congress have not power to give original jurisdiction to the Supreme Court in cases other than those described in the Constitution.’ *Marbury v. Madison*, 5 U. S. 137 (2). If Congress can withhold power to determine the validity of an Act from one Court, it could withhold such power from all inferior Courts. It would follow that Congress could require an inferior Court to render judgment in a case depending entirely on a void statute and prevent its validity from being passed on by any inferior Court. In a case, therefore, of which the Supreme Court has no original jurisdiction, the validity of the Act could never be questioned in any Court.”

Judge Deaver’s conclusion as to his right to have determined the validity of the act is fully supported by authority.

In *Adkins v. Children's Hospital*, 261 U. S. 525, at page 544, is the following language:

"The Constitution, by its own terms, is the supreme law of the land, emanating from the people, the repository of ultimate sovereignty under our form of government. A Congressional statute, on the other hand, is the act of an agency of this sovereign authority and if it is in conflict with the Constitution must fall, for that which is not supreme must yield to that which is. To hold it invalid (if it be invalid) is a plain exercise of the judicial power—that power vested in courts to enable them to administer justice according to law. From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law, and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding on no one. This is not the exercise of a substantive power to review and nullify Acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the Court, to the determination of which must be brought the test and measure of the law."

In *Smyth v. Ames*, 169 U. S. 466, at page 527, this Court said:

"The idea that any Legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation."

In United States v. Butler, 297 U. S. 1, at page 62, the Supreme Court said:

"There should be no misunderstanding as to the function of the Court in such a case. It is sometimes said that the Court assumes a power to overrule or control the action of the people's representatives. This is a misconception. . . The Constitution is the supreme law of the land, ordained and established by the people. All legislation must conform to the principles it lays down. When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty, to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution, and having done that, its duty ends."

This Court, in Carter v. Carter Coal Company, 298 U. S. 238, at page 296, said:

"The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute, but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and therefore by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the Supreme law and reject the inferior statute whenever the two conflict. In the discharge of that duty, the opinion of the lawmakers that a statute passed by them is valid must be given

great weight, *Adkins v. Childrens Hospital*, 261 U. S. 525, 544; but their opinion, or the Court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry. *Schechter v. United States*, 295 U. S. 495, 549-50."

In *Chicago Railway Company v. Wellman*, 143 U. S. 339, at page 345, this Court said:

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question 'involving the validity of any Act of any Legislature, State or Federal, and the decision necessarily rests on the competency of the Legislature to so enact, the Court must, in the exercise of its solemn duties, determine whether the act is constitutional.'

"Although the doctrine was not established without dispute, it is now a settled principle of the American system of constitutional law that the Courts have inherent authority to determine whether statutes enacted by the Legislature transcend the limits imposed by the Federal and State Constitutions and to determine whether such laws are or are not constitutional."

11 American Jurisprudence, page 709 (Section 86), citing *United States v. Butler*, *supra*; *Adkins v. Children's Hospital*, *supra*; *McCravy v. United States*, 195 U. S. 27, 55; *Income Tax Cases*, 157 U. S. 429; *Powell v. Pennsylvania*, 127 U. S. 678; *Nashville v. Cooper*, 6 Wall. 250; *Dodge v. Woolsey*, 18 Howard 331; *Hamilton Bank v. Dudley*, 2 Peters 492; *Houston v. Moore*, 5 Wheaton 1; *Fletcher v. Peck*, 6 Cranch 87; *Marbury v. Madison*, 1 Cranch 137.

"If the Constitution prescribes one rule and the law another and a different rule, it is the duty of the Courts to declare that the Constitution and not the law governs in cases before them for judgment."

Ibid., page 711.

The power of construing the Constitution must necessarily be lodged in some department of the government to insure that practical sanction to its mandate which seems essential for the preservation of its validity and force.

Ibid., page 711, citing *Wells v. Missouri Pacific R. Co.*, 110 Mo. 286.

"In no other way known to intelligent men can a government by written Constitution exist, except there be power somewhere to make statutes square with that instrument, and to say whether or not they do. That high power is now lodged with the Courts; there it has been for generations and there it must remain until the people by the exercise of their sovereign will, expressed in a constitutional way, take it away and lodge it elsewhere."

Tubercular Hospital v. Peter, 253 Mo. 520, 161 S.W. 1155.

The case of *Abelman v. Booth*, 21 Howard 506, contains potent language.

The Court pointed out (page 518) that the judicial power was conferred on the General Government in clear, precise and comprehensive terms. "It is declared that its judicial power shall (among other subjects enumerated) extend to all cases in law and equity arising under the Constitution and laws of the United States" (Emphasis ours.)

Different language is employed in the Constitution when conferring supremacy upon the laws of the United States than when conferring jurisdiction upon its Court. In the Supremacy Clause, it provides that "this Constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land, and obligatory upon the Judges in every State" (Ibid., page 519).

After calling attention to that fact the Court said:

“The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land”
(Ibid., page 519).

And at page 520:

“And in conferring judicial power upon the Federal Government, it declares that the jurisdiction of its Courts shall extend to all cases arising under ‘this Constitution’ and the laws of the United States—leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of Congress, whether it be made within the limit of its delegated powers, or be an assumption of power beyond the grants in the Constitution. This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government. And as the Constitution is the fundamental and supreme law, if it appears that an Act of Congress is not pursuant to and within the limits of the power assigned to the Federal Government, it is the duty of the Courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the Constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the Constitution is under their view when any Act of Congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if not pursuant to the legislative powers conferred upon Congress.”

In a very recent case (*Schneidermann v. United States* . . . U. S. . . ., 63 Sup. Ct. 1333), in the concurring opinion,

of Mr. Justice Rutledge (63 Sup. Ct. 1357) occurs this apt language:

“Congress has, with limited exception, plenary power over the jurisdiction of the Federal Courts. But to confer the jurisdiction and at the same time nullify entirely the effects of its exercise are not matters heretofore thought, when fairly faced, within its authority.”

It may be argued that granting that the Court had jurisdiction to pass upon the constitutionality of the Act, it had no power or jurisdiction to consider the validity of the rent regulation [Act, Section 264 (d), 50 U. S. C. A., App., Section 924 (d)].

In the recent case of Lockerty et al. v. Phillips, U. S., 63 Sup. Ct. 1019, at the conclusion of the opinion Your Honors said:

“We have no occasion to determine now whether, or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in Courts other than the Emergency Court of Appeals, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it.”

That occasion seems now to present itself.

To say that a Court would have the right to declare the Act unconstitutional, but not a regulation issued under it, would make the creature superior to the creator.

Under the Act the Administrator is impotent until he implements himself with a regulation. In order to effectuate the purposes of the Act he must first issue a declaration and then a regulation. Rents are not regulated, stabilized, or “frozen” by the terms of the Act. Rents are regulated only when the regulation is promulgated by the Administrator pursuant to the Act. The Act is without

life until the regulation breathes life into it. A property owner could not come into any Court and assail the validity of the Act unless a regulation had been issued under the Act. The Act affects no property owner until a regulation is issued. No property owner is in position to complain until he is subjected or about to be subjected to a regulation. A litigant can question a statute's validity only when and so far as it is about to be applied to his disadvantage.

Bank v. Craig, 181 U. S. 548;

Brown Forman Co. v. Kentucky, 217 U. S. 563;

Board of Trade v. Olsen, 262 U. S. 1.

That is demonstrated by the provisions of Section 203 (a) of the Act (U. S. C. A., Title 50, App., Section 923):

“Within a period of sixty days after the issuance of any regulation or order under Section 2 (Section 902 of this Appendix) . . . any person subject to any provision of such regulation, order . . . may . . . file a protest specifically setting forth objections to any such provision. . . .”

When and if that protest is denied, the person aggrieved may file a complaint with the Emergency Court of Appeals.

But until a regulation is issued, no person has any right to “protest” against the terms of the mere Act. The regulation gives the Act vitality. It is not the Act alone which deprives property owners of their property (we say unconstitutionally), but the Act fortified, vitalized and implemented by the Regulation.

Section 205 (a) of the Act [U. S. C. A., Title 50, App., Section 925 (a)] provides that whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute a

violation of Section 4 of the Act (Section 904, U. S. C. A., Title 50, App.), the Administrator may seek injunctive relief from the appropriate Court. But a person cannot violate Section 4, until that section shall have been vitalized by the issuance of a regulation and/or order. Under Section 4 (a) it is unlawful (among other things) for a person to receive rent for any defense-area housing accommodations in violation of any regulation or order under Section 2 of the Act (Section 902, U. S. C. A., Title 50, App.). But there is not any such thing as a "defense-area housing accommodation" until such "defense-area" has been established by the Administrator by a declaration under the Act. There is not any such thing as a "maximum rent" for that "defense-area housing accommodation" until that maximum rent shall have been established by a regulation issued by the Administrator under the terms of the Act.

The appellant, when he filed his complaint in the Court below, recognized that the appellee could not possibly have violated or attempted to have violated the Act standing alone. She was charged with violations and attempted violations of the Act, "the same being also violations and attempted violations of Maximum Rent Regulation No. 26" (Complaint, Paragraph 1, Tr., page 1). The appellant brought his action "to restrain violations and attempted violations of and to enforce compliance with, said 'Act and said Regulation as amended'" (Complaint, Paragraph 2, Tr., page 2). One of the prayers, and the principal prayer, of his complaint is that she be enjoined from "performing any further acts or practices in violation of the Emergency Price Control Act of 1942 and Maximum Rent Regulation No. 26" (Tr., page 4).

We paraphrase the language of Judge Deaver in his opinion in *Payne v. Griffin* (Tr., page 30):

In this case the appellant sought an injunction against the appellee. If a right to such injunction exists at all,

it exists solely by reason of the statute and the regulation made pursuant to the statute. If the statute is valid and the regulation is valid, they together may create a cause of action entitling the appellant to an injunction. If the statute is not valid, the regulation is nothing, and no cause of action exists. Jurisdiction to try the case is jurisdiction to determine whether appellant is entitled to an injunction. To decide that question, the Court was bound to ascertain what law governed. If the regulation is valid; it has the form of law, but it is no law apart from the statute itself. The statute and the regulation are interdependent in creating the cause of action and there is no cause of action unless both are valid. Whether either is valid depends upon its conformity to the supreme law of the land. If by that supreme law the statute is void, the regulation falls and there is no law authorizing the grant of an injunction.

The observation of an unconstitutional law cannot be compelled.

Itasca Paper Co. v. Niagara Fire Ins. Co., 220 N. W. 425, 175 Minn. 73.

A void statute confers no right and imposes no obligations.

City of Ottawa v. Hulse, 332 Ill. 286, 163 N. E. 685.

An unconstitutional law, being void, imposes no duty and confers no authority, and creates no obligation which can be enforced by subsequent legislation.

Anderson v. Lehmkuhl, 119 Neb. 451, 229 N. W. 773.

Act empowering municipalities having board of aldermen to change ward lines providing for unconstitutional classification requires resolution thereon to be set aside.

Eckert v. Board of Aldermen of Paterson, 147 Atl. 380, 7 N. J. Misc. 850.

"An unconstitutional Act is not a law; it confers no rights, it imposes no duties, it affords no protection, it creates no office, it is, in legal contemplation, as inoperative as though it had never been passed."

Norton v. Shelby County, 118 U. S. 425, 426, 442.

The Rent Control Sections of the Emergency Price Control Act Are Unconstitutional and Void, Being Violative of Article I, Section 1, of the Constitution of the United States.

(The "Rent Control Sections" of the Emergency Price Control Act, consideration of which are necessary for determination of this case, are, we think, Section 1 [U. S. C. A., Title 50, App., Section 901]; Sections 2 (b), 2 (c) 2 (d), 2 (g) [U. S. C. A., Title 50, App., Section 902 (b, c, d, g)]; Section 4 (a) [U. S. C. A., Title 50, App., Section 904 (a)]; Section 201 (a) and (b) [U. S. C. A., Title 50, App., Section 921 (a) and (b)]; Section 204 [U. S. C. A., Title 50, App., Section 924]; Section 205 (a) [U. S. C. A., Title 50, App., Section 925 (a)]; Section 302 (d, e, f, g, k) [U. S. C. A., Title 50, App., Section 942 (d, e, f, g, k)].)

We approach this phase of the case with the firm conviction that the following statement of this Court in A. L. A., Schechter Poultry Corporation v. United States, 295 U. S. 495, 530, 55 Sup. Ct. 837, 843, remains the law of the land:

"... the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said (in Panama Refining Co. v. Ryan, 293 U. S. 388, 421, 55 Sup. Ct. 241) that the constant

recognition of the validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitution system is to be maintained." (Emphasis and parenthesis ours.)

Immediately following the language quoted the Court said:

"Accordingly, we look to the statute to see whether Congress has overstepped these limitations—whether Congress in authorizing 'code of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."

We must examine the Rent Control provisions of this Act to determine whether Congress has itself established the standards of legal obligation, or whether, by the failure to enact such standards, has attempted to transfer that function to others.

We confidently assert that the Congress failed to enact standards of legal obligation, but, on the contrary, attempted to transfer that function to the Price Administrator.

The Act, with respect to rents, is not self-effective.

The Act created an office of Price Administration to be under the direction of a Price Administrator, to be appointed by the President, by and with the advice and consent of the Senate. That Administrator was authorized whenever in his judgment such action was necessary or proper in order to effectuate the purposes of the Act to issue a declaration setting forth the necessity for, and recommendations with reference to the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense rental area [Act, Section 2 (b)].

U. S. C. A., Title 50, App., Section 902 (b)]. If, within sixty days after the issuance of any such recommendations, rents for any such accommodations within such defense-rental area have not, in the **judgment** of the Administrator, been stabilized or reduced, in accordance with the **recommendation**, the Administrator may by regulation or order establish such maximum rent or maximum rents as in his **judgment** will be generally fair and equitable and will effectuate the purposes of the Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or **comparable accommodations** on or about April 1st, 1941 (or if, prior or subsequent to April 1st, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of the Act, then on or about a date (not earlier than April 1st, 1940), which in the judgment of the Administrator does not reflect such increases. He shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such regulations or orders, the Administrator shall, to such extent as he determines to be practicable, consider any recompiendations which may be made by State and local officials concerned. Any regulation or order under this section may be established in such form and manner, may contain such **classifications** and **differentiations**, and may provide for such **adjustments** and reasonable exceptions as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of the Act.

Even with the appointment of the Administrator, rent control did not become effective throughout the United States or in any part of the United States.

It was necessary for the Administrator to take an initial step before the machinery began to operate. His first step was when, in his judgment, it was necessary or proper to effectuate the purposes of the Act to issue a declaration setting forth the necessity for and recommendations with reference to reduction of rents within a **particular defense-rental area**.

The question naturally occurs: What is a "defense rental area"?

That question is answered, as far as it can be answered, by Section 302 (d) of the Act [U. S. C. A., Title 50, App. 942 (d)]:

"The term 'defense rental area' means the District of Columbia and any area designated by the Administrator as an area where defense activities have resulted or **threatened** to result in an increase in the rents for housing accomodations inconsistent with the purposes of this Act." (Emphasis ours.)

Therefore, in order for rent control to have become effective in any part of the United States outside of the District of Columbia, it was necessary for the Administrator to have "carved out" that area and denominated it as a "defense rental area."

By what standards was the Administrator compelled by law to act when he made that denomination of a defense rental area? When he segregated one part of the United States from the rest of it and denominated it as a defense rental area?

The only standard, if such it may be called, is that it must have been an area in which in the **judgment** of the Administrator **defense activities** have resulted in an increase in rents inconsistent with the **purposes of the Act**.

If this is a "standard," the criteria of the standard are:
(a) The judgment of the Administrator; (b) Defense activities; (c) The purposes of the Act.

(a) The determination of "his judgment" required him to make no finding of facts, to consult no one, to confer with no one, to give no one a hearing. In the designation, the Act does not even compel him to consider recommendations from State or local officials. He did that "to such extent as he determined to be practicable" (Act, Section 2 (b), last three lines).

(b) What are "defense activities"? The only answer we can give is that defense activities are whatever activities the Administrator says are defense activities. Again with respect to "defense activities" in a given area, he is required to consult no one, confer with no one, hear no one, see no one, make no finding of facts.

(By Section 202 of the Act [U. S. C. A., Title 50, App., Section 922] he is **authorized** to make such studies and investigations and to obtain such information **as he deems necessary or proper** to assist him in prescribing a regulation.)

"Here, in effect, is a roving commission to inquire into evils and upon discovery correct them."

Schechter v. U. S., 295 U. S., at page 551.

(c) What are purposes of the Act?

The purposes of the Act are to stabilize prices and to prevent **speculative, unwarranted, and abnormal increases in prices and rents**; to eliminate and prevent profiteering; hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal marketing conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices, to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons

engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post-emergency collapse of values; to stabilize agricultural prices in the manner provided in Section 3; and to permit voluntary co-operation between the government and producers, processors, and others to accomplish the aforesaid purposes. (Emphasis ours.)

Does that list of purposes furnish a "standard"? If so, the Congress may appoint an Administrator "to correct all evils in the universe." Such a "standard" would be just as definite as the "purposes" of this Act.

The only place in which "rents" are mentioned in the purposes of the Act (Section 1) is the boldface portion of the foregoing quotation. Let us then fit those quoted words into the definition of "defense rental area" and see what kind of a standard we have:

The term "defense rental area" means any area designated by the Administrator as an area where defense activities have resulted or threatened to result in speculative, unwarranted, and abnormal increases in rents.

Is that definition a "standard" in the eyes of the law? What increase is speculative, and what unspeculative? What increase is warranted and what unwarranted? What increase is normal and what abnormal?

Only the Administrator can answer, and who can dispute him! What facts did he have before him when he determined that an increase in one area was normal, warranted, and unspeculative, and that in another abnormal, unwarranted and speculative?

The answer is: No one knows. The Administrator has proceeded with an "unfettered discretion."

"He (the Administrator) possesses here not only a figurative 'roving commission,' but one in potent lit-

erality. He may move from State to State, from County to County, and according to the 'spirit moves' or in the measure of his last nocturnal sojourn, whether restful or restless, his morning meal palatable, or inedible, find or decline to find, as for that territorial locality where each morning discovered him, that it was an 'area where defense activities' have resulted or threaten to result in an increase in the rents for housing accommodations which will bring about speculative, unwarranted, and abnormal increases in rents which tend to defeat or obstruct the effective prosecution of the war. He (the Administrator) becomes the general agent of the Congress—first to choose the area for legislation, then to choose the character of the legislation that he believes suits the area selected for action, and there to enforce it in the manner he sees fit."

Roach v. Johnson, 48 Fed. Sup. 833.

Having "chosen the area" the Administrator then issued a declaration or recommendation.

What standard determined whether or not he should issue a declaration?

The first sentence of Section 2 (b) of the Act [Title 50, App., Section 902 (b), U. S. C. A.] furnishes the only answer: "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area." (Emphasis ours.)

Let us again transpose from the "purposes" of the Act, and we have this standard or formula:

Whenever in the judgment of the Administrator, such action is necessary, or proper in order to effectively prosecute the present war and to prevent speculative, unwarranted and abnormal increases in rents, he shall issue a

declaration setting forth the necessity for, and recommendations with reference to the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area.

The Court will find a typical "Designation and Rent Declaration" in Volume 7, Federal Register 1677. We shall supply a copy thereof as a part of the appendix to this brief. Of this designation and declaration the Court below has said:

"Without reciting all the statements in the rent Declaration and in the Regulation, it is sufficient to say that those documents, in effect, simply declare that in the Administrator's judgment the basic facts exist and do not contain findings of subsidiary facts such as the Supreme Court has held necessary" (Tr., page 35).

In this "declaration" property owners were not advised (and the law does not require that they should be) of the basis of the Administrator's judgment. They were given no opportunity to be heard. The law furnished no standard as to what was a normal rent, a rent which reflected only normal, warranted and unspeculative rent. Suppose rents in a given area had increased over 1930, 1936, or 1939, how was the Administrator to determine whether that increase was normal or abnormal? Speculative or unspeculative? Warranted or unwarranted?

The law furnishes no standard except "the judgment of the Administrator"—and "unfettered discretion." But having determined that there had been an increase contrary to the purposes of the Act, the Administrator had to go further and recommend "the stabilization or reduction of rents for any defense-area housing accommodations" within the area. What standard is there for the Administrator to follow in deciding whether he should recommend a "stabilization" or a "reduction"? His judgment alone dictated the answer to this question. But, having

determined that they should be reduced, what standard is there for the Administrator to follow in deciding the quantity of the reduction? His judgment alone dictated the answer to this question. Having determined that rents should be reduced, he must next decide as to what housing accommodations in the area the reduction should apply. The Act authorizes him to recommend reduction of rents for "any defense-area housing accommodations" within the area. Which should he select for treatment, and which should he leave be? The Act fails to answer that question, unless the phrase "the judgment of the Administrator" furnishes the answer.

Now that the Administrator had selected the area for the operation of the law and recommended a stabilization or reduction of rents, the Act decreed that he must wait sixty days before putting his recommendations into effect. He was required to notify no one as to his recommendations. He was required to give no one a hearing. He was required to notify no one as to the facts upon which he based his judgment. But, says the law:

"If within sixty days after the issuance of any such recommendation rents for **any** such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, **in accordance with the recommendations**, the Administrator may by regulation or order establish such **maximum rent OR maximum rents** as in **his judgment** will be **generally fair and equitable** and will effectuate the purposes of this act."

[Act, Section 2 (b), U. S. C. A., Title 50, App., Section 902 (b)].

(Emphasis ours.)

The only prerequisite to the issuance of the regulation (after the expiration of the sixty-day period) establishing

maximum rents is that rents have not in the judgment of the Administrator been stabilized or reduced in accordance with his recommendations.

His recommendations may have been entirely erroneous. That fact made no difference. Rents may have been stabilized or reduced during the sixty-day period. That fact made no difference. The "standard" is: They must have been reduced in accordance with the Administrator's recommendation, erroneous though it may have been. And he determined whether or not they had been stabilized or reduced in accordance with his recommendation with no standard for the determination. Having so determined, he proceeded to issue the regulation or order. Should he establish a "maximum rent" or "maximum rents" for the area? Should the maximum rent be the same throughout the area or should it vary in different Counties, different Cities, different wards of a City, different streets of a ward, different portions of a street? His unfettered discretion dictated the answer.

What should be the "form and manner" of the establishment of such regulation? What classification and differentiations should it contain? For what adjustments and reasonable exceptions should it provide? What exceptions are reasonable and what unreasonable? Section 2. (e) [U. S. C. A., Title 50; App., Section 902 (e)] furnishes the only answer or standard:

"Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act." (Emphasis ours.)

We come to the most vital question. What should be the amount of the rent permitted to be charged? What

should determine the maximum rent for such accommodations so carried out? The Act says merely: "such maximum rent or maximum rents . . . as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."

What does the phrase "generally fair and equitable" mean? What sort of a guide or standard does that phrase furnish? It is preceded by the words "in his judgment." So, the delegation by Congress to the Administrator was to fix a rent in area selected by him which he deemed to be generally fair and equitable.

" . . . the standard, which would prevent the Act from being unconstitutional, is not rents which in the judgment of the Administrator are fair and equitable, but rents shown by ascertained and recorded facts to be fair and equitable" (Judge Deaver's opinion, Tr., page 36).

What legal meaning has the phrase "generally fair and equitable?" The literal meaning of the phrase is: "In the main, just." Therefore, the direction of Congress is that the Administrator fix rents which he deems to be just, in the main. They may be unjust to tenants and just to owners in particular cases. They may be just to tenants and unjust to owners in particular cases. But, that would be perfectly legal and constitutional, appellants contend, just so the rents fixed are "in the main just" the law is satisfied. We confidently assert that this cannot be so under the American system of constitutional government.

What does the word "just" indicate? Fair—but fair from what standpoint? From the standpoint of a fair return on the property? The law does not say so. The law simply says that what the Administrator thinks is "generally fair and equitable" shall be generally fair and equitable.

There are other suggestions made by the Congress to the Administrator for his consideration in determining whether a rent is generally fair and equitable.

So far as practicable, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations or comparable accommodations on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of the Act, then on or about a date [not earlier than April 1, 1940], which in the judgment of the Administrator does not reflect such increases).

He shall make adjustments for such relevant factors as he may determine to be of general applicability in respect of such accommodations, including property taxes and other costs.

In prescribing regulations and orders establishing maximum rents, he shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area.

Can a broader grant of power to an administrative officer be imagined by the Court than that contained in Sections 2 (b) and 2 (c) of this Act? Stripped of surplusage and legal redundancy, Congress, by this Act, simply granted to an appointed official the right to go anywhere he pleased in the United States, at any time he pleased, and fix such rents as he pleased, as he deemed fair. Congress simply said by this Act that rents of housing accommodations in the United States should be controlled during the war. In what parts of the country such control should become effective, at what times it should become effective, the degree of the control, the manner of the control, all of these elements were left to the unfettered discretion of an administrative official.

We confidently assert that such an Act, such a sweeping delegation of power is violative of Article I, section 1, of the Constitution:

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The Congress cannot constitutionally appoint an attorney-in-fact, in its name and stead to legislate on the subject of rent control. That it has attempted to do. The attempt is unconstitutional and void tested by the principles of any case heretofore decided by this Court.

We have previously in this brief adverted to the case of Panama Refining Co. v. Ryan, 293 U. S. 388, 55 Sup. Ct. 241, and referred to the language of this Court at page 421 of the official reports.

The Court, in the Panama Refining Company case, at page 415, prescribed the yardstick by which the constitutional measure of statutes of this nature should be taken. The Court, speaking through Mr. Chief Justice Hughes (Mr. Justice Cardozo dissenting), said:

"Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition."

In the Emergency Price Control Act of 1942, in the first section of the Act, the Congress did declare its purposes in broad general terms, and as to rents did say specifically that one of the purposes of the Act was to stabilize them and prevent speculative, unwarranted, and abnormal increases thereof.

As we have pointed out in considerable detail, Congress has not set up a standard for the Administrator's action.

Congress has not required any legal finding by the Administrator in the exercise of the authority to fix maximum rents.

"In the present case, the Administrator, though contending that findings are not necessary, says he has made findings. That depends, of course, upon his definition of findings. Without reciting all the statements in the rent Declaration and in the Regulation, it is sufficient to say that those documents, in effect, simply declare that in the Administrator's judgment, the basic facts exist and do not contain findings of subsidiary facts such as the Supreme Court has held necessary. If the requirement that the rent fixed shall be what the Administrator thinks is 'fair and equitable' be a standard, his so-called findings simply state that in his judgment they are fair and equitable without containing the intermediate facts which caused him to think so."

Judge Deaver's opinion (Tr. page 35).

"An express finding, if the Administrator were required to make (it) that the prices fixed would effectuate the purposes of the Act, would not be a standard, but a mere statement of opinion. Schechter Corp. v. United States, 295 U. S. 495 (8)."

Ibid, Tr., page 37.

(The language referred to by Judge Deaver in the Schechter case is at page 538 of the opinion in the official reports.)

Findings should be statements of the ultimate facts in the controversy, and not of probative facts or mere conclusions of law.

Murphy v. Bennet, 9 Pac. 738, 739, 68 Cal. 528.

Mr. Justice Cardozo dissented from the ruling of the majority in the **Panama Refining Co. case**. But, in the

Schechter, he concurred, and wrote a concurring opinion which commences with language both striking and apt:

"The delegated power of legislation which has found expression in this Code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion—Panama Refining Co. v. Ryan, 293 U. S. 388, 440. This Court has held that delegation may be unlawful, though the act to be performed is definite and single, if the necessity, time and occasion of performance have been left in the end to the discretion of the delegate. Panama Refining Co. v. Ryan, supra. I thought that ruling went too far. I pointed out in an opinion that there had been 'no grant to the Executive of any roving commission to inquire into evils and then, upon discovering them, do anything he pleases'—293 U. S. 388, at page 435. Choice, though within limits, had been given him 'as to the occasion, but none whatever as to the means.' Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here, in effect, is a roving commission to inquire into evils and, upon discovery correct them."

295 U. S., at page 551.

In the statute now under consideration, to the Administrator is given choice as to time, place, and manner of execution of the delegated power. He executes the power wherever in his opinion rents have increased contrary to the purposes of the Act; whenever in his judgment such action is necessary, or even proper, to effectuate the purposes of the Act; in such form and manner as in his judgment are necessary or proper to effectuate the purposes of the Act.

"The maxim that a Legislature may not delegate legislative power has some qualification, as in the cre-

ation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. If the latter qualification is made necessary in order that the Legislative power may be effectively exercised. In creating such an administrative agency, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking; the order is ineffective. It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this. It is doubtful whether the facts averred in the petition were sufficient to justify a finding that the contract rates were unreasonably low; but we do not find it necessary to answer this question. We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the State."

Wichita Ry. & Light Co. v. Public Utilities Commission, 260 U. S. 48, 59, 43 Sup. Ct. Rep. 51, 55.

The statute of the State of Kansas there under consideration as set out by the Court in the opinion was:

"It shall be the duty of the Commission, either upon complaint or upon its own initiative, to investigate all rates . . . fares . . . and if after full hearing and investigation the Commission shall find that such rates . . . are unjust, unreasonable, unjustly discriminative, or unduly preferential, the Commission

shall have power to fix and order substituted therefor such rate or rates . . . as shall be just and reasonable."

It is true that that statute contained the words "shall find" and that the word "find" does not appear in the Emergency Price Control Act. Perhaps the authors of the Act designedly omitted the word. The omission of the specific word "find" creates no distinction. The power conferred upon the Price Administrator becomes operative whenever an area shall be **designated** by him as an area where defense activities have resulted or threatened to result in an increase in rents inconsistent with the purposes of the Act and whenever **in his judgment** his action is proper or necessary to effectuate the purposes of the Act.

The Act, of necessity, implies that that "designation" is a "finding," that the exercise of his judgment shall be based upon a "finding" of necessity or propriety.

In Carter v. Carter Coal Company, 298 U. S., at page 332, Mr. Justice Cardozo (in a dissenting opinion) was of the opinion that there had been no excessive delegation of legislative power. But he pointed out that the prices to be fixed by the district boards and the commission must have conformed to the following standard:

- (a) They must have been just and equitable;
- (b) They must have taken account of the weighted average cost of production for each minimum price area;
- (c) They must not have been unduly prejudicial or preferential as between districts or as between producers within a district;
- (d) They must have reflected as nearly as possible the relative market value of the various kinds, qualities and sizes of coal, at points of delivery in each common consuming market area;

(e) The minimum for each district should yield a return net per ton, not less than the weighted average of the total costs per ton of the tonnage of the minimum price area;

(f) The maximum for any mine, if a maximum were fixed, must have yielded a return not less than cost plus a reasonable profit.

All these elements, save the first, are lacking in the statute here assailed.

With respect to the point now being presented, counsel (in the Court below) for the appellant cited the following decisions of this Court:

Opp Cotton Mills v. Administrator, 312 U. S. 126;
Sunshine Anthracite Coal Co. v. Adkins, 310 U. S.
381;

United States v. Rock Royal Co-operative, 307 U. S.
533;

New York Central Securities Corp. v. United States,
287 U. S. 12;

Chesapeake & Ohio Railway Co. v. United States,
283 U. S. 35;

Union Bridge Co. v. United States, 204 U. S. 364.

In the Opp Mills case the Court says that the essentials of legislative function

"are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is effective."

Opinion, page 145;

Judge Deaver's Opinion (Tr., page 34).

The trial Judge might also have alluded to language of this Court at page 144 of the opinion, the mere quoting of which serves to distinguish that case from this:

"The mandate of the Constitution, that all legislative powers granted 'shall be vested' in Congress,

has never been thought to preclude Congress from resorting to the aid of administrative officers or boards as fact-finding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of Congressional policy, have been made prerequisite to the operation of its statutory command. The adoption of the declared policy by Congress and its definition of the circumstances in which its command is to be effective, constitutes the performance, in the constitutional sense, of the legislative function."

"True, the appraisal of facts in the light of the declared policy and in conformity to prescribed legislative standards, and the inferences to be drawn by the administrative agency from the facts, so appraised, involve the exercise of judgment within the prescribed limits. But where, as in the present case, the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by the statute to be kept or which is in fact preserved, are such that Congress, the Courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function." (Emphasis ours.)

The problem involved in Sunshine Coal Co. v. Adkins, supra, was the constitutionality of the Bituminous Coal Act of 1937 (15 U. S. C. A., Sections 828-851), enacted because the labor provisions of the Bituminous Coal Conservation Act of 1935 had been held unconstitutional in Carter v. Carter Coal Company, supra. Mr. Justice Douglas, writing for the Court, pointed out that the majority of the Court in the Carter case did not pass on the price-fixing features of the earlier Act. He said:

"The Chief Justice and Mr. Justice Cardozo, in separate minority opinions, expressed the view that the price-fixing features of the earlier act were constitu-

tional. We rest on their conclusions for sustaining the present Act."

Page 397.

We have previously in this brief pointed out the elements designated by Mr. Justice Cardozo as supporting the constitutionality of that Act, elements lacking here, save one of them. At page 397 of the opinion Mr. Justice Douglas repeats those elements which were designated by Mr. Justice Cardozo as sufficient to support the delegation among which are: "No maximum price shall be established for any mine which will not yield a fair return on the fair value of the property."

At page 398 Mr. Justice Douglas calls attention to the fact that the Packers and Stockyards Act (7 U. S. C., Section 211) provided the standard of "just and reasonable" to guide the administrative body in the rate-making process. He said:

"The validity of that standard (*Tagg Brothers & Morehead v. United States*, 280 U. S. 420 . . . make(s) it clear that there is a valid delegation of authority in this case.)"

As we read *Tagg Brothers & Morehead v. United States*, we do not see that the Act was attacked on the ground of an invalid delegation of legislative power. The constitutional attack seems to have been that if the Act be construed as conferring authority upon the Secretary of Agriculture to prescribe charges, it exceeded the constitutional power of the Federal Government "because it is not a regulation of commerce and violates the Fifth Amendment, because the charges so to be fixed are those for personal services" (280 U. S., at page 434).

By the Packers and Stockyards Act (U. S. C., Vol. 7, Section 211) the Secretary of Agriculture may determine and prescribe what will be "the just and reasonable rate

or charges . . . to be thereafter observed." But as a pre-requisite to his determination and prescribing there must have been a "full hearing" upon a complaint made as provided in Section 210, or after "full hearing" upon an order for investigation and hearing made by the Secretary.

That statute was considered by this Court in *Morgan v. United States*, 298 U. S. 468, 56 Sup. Ct. 906, and at page 479 the Court unanimously said:

"What is the essential quality of the proceeding under review, and what is the nature of the hearing which the statute prescribes? The proceeding is not one of ordinary administration, conformable to the standards governing duties of a purely executive character. It is a proceeding looking to legislative action in the fixing of rates of market agencies. And, while the order is legislative and gives to the proceeding the distinctive character . . . it is a proceeding which by virtue of the authority conferred has special attributes. The Secretary, as the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed. Congress has required the Secretary to determine, as a condition of his action, that the existing rates are or will be 'unjust, unreasonable, or discriminatory.' If and when he so finds, he may 'determine and prescribe' what shall be the just and reasonable rate, or the maximum or minimum rate thereafter to be charged. That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. **There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact.** Nothing can be treated as evidence which is not introduced as such. . . . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. **Findings based on the evidence must embrace**

the basic facts which are needed to sustain the order.

A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a **quasi judicial character**. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings, in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." (Emphasis ours.)

How utterly different is the statute under consideration, which simply provides for the fixing of rents "generally fair and equitable" without the semblance of a hearing being prescribed by statute, which provides that to assist him in prescribing any regulation under the Act, the Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper [Act, Section 202 (a); 50 U. S. C. A. App., Section 922 (a)].

Mr. Justice Douglas in the Adkins case also stated that the criterion of "public interest" had been upheld in *New York Central Securities Corporation v. United States*, 287 U. S. 12, 24. Sections 5 and 20 (a) of the Interstate Commerce Act were assailed in that case. Appellant insisted "that the delegation of authority to the Commission is invalid because the stated criterion is uncertain." The Court said:

"That criterion is the 'public interest.' It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary" (page 24 of 287 U. S.). (Emphasis ours.)

What did the Court mean by the emphasized words in the foregoing quotation?

Section 5 (2) of the Interstate Commerce Act commences:

"Whenever the Commission is of opinion, after hearing upon application of any carrier . . . engaged in the transportation . . . that the acquisition to the extent indicated by the Commission . . . will be in the public interest . . ." (Emphasis ours.)

The statute involved in *United States v. Chemical Foundation*, 272 U. S. 1, was Section 12 of the Trading with the Enemy Act of 1917, which vested the Alien Property Custodian with the powers of a common law trustee with respect to property of alien enemies taken over by him, and granting to him powers of sale of such property with the following proviso:

"Provided, that any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale, to the highest bidder, after public advertisement of time and place of sale, which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest, shall otherwise determine."

After the war, the United States brought suits to set aside sales made by it to the Chemical Foundation.

The following language of the Court (opinion, pages 11-12) is pertinent:

"While not denying the power to confiscate enemy properties, the United States argues that as construed below the provision in question is unconstitutional because it attempts to delegate legislative power to the Executive. But the Act gave the Custodian, acting under the President, full power of disposition. No restriction was put upon disposition other than sales. And sales to the United States were not regulated. The general rule laid down was that all dispositions by sale or otherwise should be made in accordance with the determinations of the President; the proviso made an exception including a class of sales; and upon the failure of the President otherwise to determine stating the reasons therefor in the public interest, it required that such sales should be made as there specified. It was not necessary for Congress to ascertain the facts of or to deal with each case. The Act went as far as was reasonably practicable under the circumstances existing. It was peculiarly within the province of the Commander-in-Chief to know the facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war. The determination of the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of war was not the making of law; it was the application of the general rule laid down by the Act. When the plenary power of Congress and the general rule so established are regarded, it is manifest that a limitation upon the excepted class is not a delegation of legislative power." (Emphasis ours.)

In Avent v. United States, 266 U. S. 127, the Court had under consideration Title 4, Section 492 (15) of the Transportation Act of 1920. Allusion as made in Sunshine-Coal Co. v. Adkins to the criterion of "public interest." The context should be noted. The Transportation Act authorized the Interstate Commerce Commission, whenever it was of the opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action ex-

ists in any section of the country, to suspend its rules as to car service and to make such reasonable rules with regard to it as in the Commission's opinion would best promote the service in the interest of the public and the commerce of the people.

The Court transferred the case to the Circuit Court of Appeals, holding that the case lacked the presence of a substantial question. The criterion seemed to be "the existence of an emergency," for the Court said, "We must take it that an emergency contemplated by the statute existed, as found by the Commission and alleged in the indictment."

In *Union Bridge Co. v. United States*, 204 U. S. 364, the Act under consideration was the River and Harbor Act of March 3rd, 1899.

At page 387, the Court said:

"To this may be added the consideration that Congress, by the Act of 1899, did not invest the Secretary of War with any power in these matters that could reasonably be characterized as arbitrary. He cannot act in reference to ~~any~~ bridge alleged to be an **unreasonable obstruction** to free navigation without first giving the parties an opportunity to be heard. He cannot require any bridge of that character to be altered, even for the purpose of rendering navigation through or under it reasonably free, easy, and unobstructed; without giving previous notice to the persons or corporations owning or controlling the bridge, specifying the changes recommended by the Chief of Engineers, and allowing a reasonable time in which to make them. If, at the end of such time, the required alterations have not been made, the Secretary is required to bring the matter to the attention of the United States District Attorney, in order that criminal proceedings may be instituted to enforce the Act of Congress. In the present case all the provisions of the statute were complied with. The parties concerned were duly notified and were fully heard, nor is there any reason to say

that the Secretary of War was not entirely justified, if not compelled, by the evidence in finding that the bridge in question was an unreasonable obstruction to commerce and navigation as now conducted." (Emphasis ours.)

A suit, brought by the Chesapeake and Ohio Ry. Co. against the United States and others, was decided by the Court in 283 U. S. (page 35). The Interstate Commerce Commission appeared as a defendant. The purpose of the suit was to set aside and annul so much of orders and certificates of the Commission as authorized certain railroads to construct and operate a new line of railroad. The certificates attacked were commonly known as certificates of public convenience and necessity.

The Interstate Commerce Act, as amended, forbade a railroad to construct a new line of railroad without first having obtained from the Commission such certificate.

The Act provided that the Commission should "have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion . . . of a line of railroad, or extension thereof described in the application . . . and may attach to the issuance of such certificate such terms and conditions as in its judgment the public convenience and necessity may require." [Section 1 (20).]

We do not find that in the Chesapeake & Ohio case the Company raised any question as to the constitutionality of the Act. The claim was that the Commission had exceeded its authority under the Act. But the Court pointed out:

"There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question. Texas and Pac. Ry. Co. v. Gulf, etc. Ry. Co., 270 U. S. 266, 273."

(Opinion, page 42.)

In **United States v. Rock Royal Co-operative, Inc., et al.**, 307 U. S. 533, the Court considered the constitutionality of the Agricultural Marketing Agreement Act of 1937 (The Rock-Royal case may well be considered along with the case of **H. P. Hood & Sons v. United States**, 307 U. S. 588).

The majority of the Court held the Act attacked in the Rock Royal case to be constitutional, but that ruling can hardly be said to be authority for a contention that the Emergency Price Control Act is constitutional.

That Act distinctly provided:

“Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity, or product thereof specified in Subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.”

“After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this Section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.” (Emphasis ours.)

The following language of the majority opinion is pertinent:

“In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the Congress needs specify only so far as is reasonably practicable” (page 574).

We have only to apply that test to the Act here under consideration, and the Act falls.

Is there such an exact standard that an affected property owner can understand the limits of the Administrator's power?

Is "generally fair and equitable" such a standard?

The Court then pointed out that the terms of orders are limited to the specific provisions, minutely set out in Sections 8 (c) (5) and (7) (page 575), and then said:

"The Secretary is not permitted freedom of choice as to the commodities which he may attempt to aid by an order. The Act, Section 8 (c) (2) limits him to milk, fish, fruits except apples, tobacco, fresh vegetables, soy beans and naval stores. The act authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable. A City milkshed seems homogeneous. This standard of practicability is a limit on the power to issue orders. It determines when an order may be promulgated" (page 576).

It may be argued that the only "charges" sought to be regulated by Section 2 (b) of our Act were rent charges, and those charges regulated only in a defense rental area. The answer is that while a "City milkshed" may be "homogeneous," and its limits defined by exact proof, a "defense rental area" cannot be so defined. A "defense rental area" under the very terms of the Act is an area designated by the Administrator as an area where defense activities have resulted or threatened to result in an increase in rents inconsistent with the purposes of the Act.

The Court further said: "It is further to be observed that the Order could not be and was not issued until after the hearings and findings as required by Section 8 (c) (4) . . . even though procedural safeguards cannot

validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority" (page 576).

As to the fixing of prices, the Court said:

"The Secretary must have first determined the prices in accordance with Section 2 and Section 8 (e), that is, the prices that will give the commodity a purchasing power equivalent to that of the base period; considering the price and supply of feed and other pertinent economic conditions affecting the milk market in the area. If he finds the price so determined unreasonable, it is to be fixed at a level which will reflect such factors, provide adequate quantities of wholesome milk and be in the public interest. That price cannot be determined by mathematical formula, but the standards give ample indications of the various factors to be considered by the Secretary."

How different is our standard of whatever rent in the judgment of the Administrator may be "generally fair and equitable."

Mr. Justice Roberts' dissent in the Hood case (307 U. S. 603) was intended also as an expression of his views in the Rock Royal case (307 U. S. 583). He said:

"Valid delegation is limited to the execution of a law. If power is delegated to make a law, or to refrain from making it, or to determine what the law shall command or prohibit, the delegation ignores and transgresses the constitutional division of power between the Legislature and the Executive branches of the government. In my view the Act vests in the Secretary authority to determine, first, what of a number of enumerated commodities shall be regulated; second, in what areas the commodity shall be regulated; third, the period of the regulation, and, fourth, the character of regulation to be imposed; and for those reasons, cannot be sustained. The statute is

an attempted delegation to an executive officer of authority to impose regulations within supposed limits and according to supposed standards so vague as in effect to invest him with uncontrolled power of legislation. Congress has not directed that the marketing of milk shall be regulated. Congress has not directed that the regulation shall be imposed throughout the United States or in any specified portion thereof. It has left the choice of both locations and areas to the Secretary. Congress has not provided that regulation anywhere shall become effective at any specified date, or remain effective for any specified period. Congress has permitted such a variety of forms of regulations as to invest the Secretary with a choice of discrete systems each having the characteristics of an independent and complete statute."

Every count of that indictment applies to the Emergency Price Control Act, except the first. Congress did limit the power of the Administrator to the control of rentals of housing accommodations. As we read the Rock Royal case and the Hood case, the majority of the Court differed with the views of Mr. Justice Roberts, principally because the majority, speaking through Mr. Justice Reed, were of the opinion: (first) that standards had been prescribed by Congress with sufficient exactness to enable those affected to understand the limits of the powers delegated, and (secondly) that the procedural safeguards provided by that Act furnished protection against an arbitrary use of properly delegated authority.

Both elements of distinction are lacking in our case. We have neither standards nor procedural safeguards.

"Where delegation has been sustained the Court has been careful to point out the circumstances which made it possible to prescribe a standard by which administrative action was confined and directed."

(Hood case, *supra*, at page 608, Mr. Justice Roberts' dissent.)

In *Mulford v. Smith*, 307 U. S. 38, the Court considered the Agricultural Adjustment Act of 1938 as it affected the tobacco crop of 1938.

Those asserting the invalidity of the Act urged that the standard for allotting farm quotas was so indefinite, vague, and uncertain as to amount to a delegation of legislative power to an executive officer and thus violated the constitutional requirement that laws should be enacted by the Congress.

Mr. Justice Roberts, speaking for the Court, said:

"What has been said in summarizing the provisions of the Act sufficiently discloses that definite standards are laid down for the government of the Secretary, first, in fixing the quota, and, second, in its allotment amongst States and farms. He is directed to adjust the allotments so as to allow for **specified factors** which have abnormally affected the production of the State or the farm in question in the test years. Certainly fairness requires that some such adjustment shall be made. **The Congress has indicated in detail the considerations** which are to be held in view in making these adjustments, and, in order to protect against arbitrary action has afforded both **administrative and judicial review** to correct errors. This is not to confer unrestrained arbitrary powers on an executive officer. In this aspect the Act is valid within the decisions of this Court respecting delegation to administrative officers" (pages 48, 49). (Emphasis ours.)

The directions given by Congress in detail are set out at page 43 of the opinion.

[It is interesting to note that Judge Deaver was one of the members of the Statutory Three-Judge Court which held this Act valid (24 Fed. Supp. 919).]

At this juncture it might be well to consider the nature of the "administrative and judicial review" afforded by the Emergency Price Control Act.

There is absolutely no provision for a review of the designation by the Administrator of an area as a "defense rental area." There is no appeal or review provided by which his action in issuing a declaration or recommendation can be corrected, if erroneous. A property owner is permitted to file a "protest" only after a regulation or order has been issued by the Administrator, and he may file that protest only if he is subject to a provision of the order or regulation. It must be filed in accordance with regulations prescribed by the Administrator. The reviewing authority is the same as the issuing authority. A proceeding may be limited by the Administrator to the filing of affidavits, or other written evidence and the filing of briefs. The Administrator, in his consideration of the protest, may take official notice of economic data and "other facts." Within thirty days after the filing of the protest the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. He is not compelled by law to grant or deny it within any specified time. Until he does deny it the doors of the Courts are closed to the protestant. If and when the protest is denied by the Administrator, the protestant may file a complaint (which is really an appeal) with the Emergency Court of Appeals created by the Act. No evidence, other than that presented to the Administrator, will be considered by the Court unless it grants leave to submit such additional evidence. The protestant has no right to examine the Administrator or cross-examine those from whom he may have received "economic data." The Emergency Court has no right to set aside a regulation or order, in whole or in part, unless the complainant establishes that it is not in accordance with law or is arbitrary and capricious.

Even if the Emergency Court so finds, the effectiveness of its judgment is postponed until the expiration of thirty

days from the entry thereof, but if within that thirty-day period the Administrator files a petition for certiorari with the Supreme Court, the effectiveness of the judgment is postponed until final disposition of the case by the Supreme Court.

The Rent Control Sections of the Emergency Price Control Act Are Unconstitutional and Void, Being Violative of the Fifth Amendment to the Constitution of the United States.

"No person shall be . . . deprived of life, liberty, or property without due process of law."

Constitution of the United States, Amendment V.

This point of law has two aspects:

(a) There is no provision in the Act for a hearing before the order or regulation fixing rents becomes effective;

(b) The language of the Act permitting the Administrator to fix rents in a given area which in his judgment are generally fair and equitable permits him to fix an unfair and inequitable rent as to particular property, thus depriving that property owner of his right to a reasonable return on the value of his property.

The former of these two aspects rests upon this principle:

"The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."

Opp Cotton Mills v. Administrator, 312 U. S. 126, at pages 152-3.

As we have previously stated, Section 2 (b) of the Act commences:

"Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of the Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense rental area."

The prime movement in the effectuation of the Act is a designation by the Administrator of an area where defense activities have resulted or threatened to result in an increase in rents for housing accommodations inconsistent with the purposes of the Act.

The Act does not require that he give property owners of the affected area any notice of his intention to designate their area, nor any opportunity to be heard on the question of whether or not, in fact, defense activities have resulted or threatened to result in abnormal, unwarranted and speculative increases. If, in the opinion of the Administrator, defense activities have resulted in the prohibited increases, or threaten so to do, the designation is made without further ado.

Having made the designation, or contemporaneously therewith, he issues a declaration and recommendation.

The Act does not require that he give to the property owners of the designated area any notice of this declaration, nor of the alleged necessity nor of the recommendations with respect to stabilization or reduction of rents in the area. Nor do they have an opportunity to be heard with respect to his ideas of necessity of reduction and his recommendations.

Then the Act provides:

"If within sixty days after the issuance of any such recommendations rents for such accommodations

within such defense rental area have not in the judgment of the Administrator been stabilized by State or local regulation or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."

The property owners of the affected area are not required to be given notice, nor have they an opportunity to be heard on the vital element contained in the sentence last quoted:

- (a) Have the rents been stabilized or reduced in accordance with the Administrator's recommendations?
- (b) Are the rents fixed by his regulation generally fair and equitable and effectuative of the purposes of the Act?

The judgment of the Administrator is the last word before the regulation becomes effective. Immediately it has the force of law. Those property owners, who have had no notice, no opportunity to be heard, must conform to the regulation, or be subject to heavy civil and criminal penalties.

True it is, that after the issuance of a regulation, a person affected thereby may file a protest and, in the event of a denial of it, file a protest with the Emergency Court.

But in the meantime the regulation remains effective. There is no provision in the law for a stay of the regulation pending the protest or the complaint in the Emergency Court.

Under previous decisions of this Court, the effect of such a drastic procedure is to deprive property owners of their property without due process of law, and the Act is unconstitutional.

The case of Charles W. Wilson and Emma Bennett v. Price Administrator (decided by the Emergency Court of Appeals July 15, 1943, 137 Fed. [2d] 348), expresses the view of that Court that the effect of a rent regulation issued under this Act is not so "take" property in the constitutional sense.

We suggest that that view is contrary to the ruling of this Court in Tyson & Bro. etc. v. Banton, 273 U. S. 418, 47 Sup. Ct. 426, in which the Court held that the owner of property has the right to fix a price at which it should be sold or used, which right is within the protection of the equal protection and due process clauses of Constitutional Amendments 5 and 14.

This right is somewhat protected as to prices on commodities under Section 2 (a) of the Act, but there is absolutely no such protection as to property owners with respect to the fixing of rents under Section 2 (6) of the Act.

We have pointed out that the Court said in the Opp. Cotton Mills case, supra, that due process demands a hearing at some point in an administrative proceeding before the final order becomes effective.

The final order is the rent regulation. In this area it became effective July 1, 1942, and has remained effective almost a year and a half. No provision is there in the law which permitted property owners to stay the regulation pending any protest which they may have filed with the Administrator and any subsequent appeal therefrom to the Emergency Court. On the contrary, the Act expressly forbids such a stay.

Morgan et al. v. United States, supra, should be considered also with respect to this phase of our case. You said there, at pages 14 and 15,

"(that this question) goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the Legis-

lature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action, and that in **administrative proceedings of a quasi judicial character** the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard,' "

citing St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, 73; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292; California Railroad Commission v. Pacific Gas and Electric Company, 302 U. S. 388; Morgan v. United States, 298 U. S. 468. (Emphasis ours.)

The Court held that the hearing held was fatally defective and the order of the Secretary invalid (Opinion, page 22). In so holding the Court handed down an opinion, some of which of the language is apt here, e. g.:

"In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusion if he gave the hearing which the law required. The Secretary read the summary presented by appellants' brief and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport. But a 'full hearing'—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet

them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

"No such reasonable opportunity was accorded appellant. The administrative proceeding was initiated by a notice of inquiry into the reasonableness of appellant's rates. No specific complaint was formulated and, in a proceeding thus begun by the Secretary on his own initiative, none was required. Thus in the absence of any definite complaint, and in a sweeping investigation, thousands of pages of testimony were taken by the examiner and numerous complicated exhibits were introduced bearing upon all phases of the broad subject of the conduct of the market agencies. In the absence of any report by the examiner or any findings proposed by the Government, and thus without any concrete statement of the Government's claims, the parties approached the oral argument."

(Opinion, pages 18 and 19.)

"The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to the mere form of the proceeding and ignores realities. In all substantial respects the Government, acting through the Bureau of Animal Industry of the Department, was prosecuting the proceeding against the owners of the market agencies. The proceeding had all the essential elements of contested litigation with the Government and its counsel on the one side and the appellants and their counsel on the other. It is idle to say that this was not a proceeding in reality against the appellants when the very existence of their agencies were put in jeopardy. Upon the rates for their services the own-

ers depended for their livelihood and the proceeding attacked them at a vital spot. This is well shown by the fact that, on the merits, appellants are here contending that under the Secretary's order many of these agencies, although not found to be inefficient or wasteful, will be left with deficits instead of reasonable compensation for their services, and will be compelled to go out of business. And to this the Government responds that if as a result of the prescribed rates some agencies may be unable to continue, because through existing competition there are too many, that fact will not invalidate the order. While we are not now dealing with the merits, the breadth of the Secretary's discretion under our rulings applicable to such a proceeding, Tagg Bros. & Morehead v. United States, 280 U. S. 420, 50 S. Ct. 220, 74 L. Ed. 524; Acker v. United States, 298 U. S. 426, 56 S. Ct. 824, 80 L. Ed. 1257, places in a strong light the necessity of maintaining the essentials of a full and fair hearing, with the right of appellants to have a reasonable opportunity to know the claims advanced against them as shown by the findings proposed by the Bureau of Animal Industry."

(Opinion, pages 20-21.) (Emphasis ours.)

At page 22 of the official reports the Court said:

“The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.”

In Porter v. Investors Syndicate, 286 U. S. 461, 52 Sup. Ct. Rep. 617, the Court had under consideration the promulgation by the Investment Commissioner of the State of Montana of a rule governing the appellee's business, and his intention to revoke appellee's permit if it failed to obey the rule. The appellee had brought an action in a specially constituted District Court to enjoin the enforcement of the order and to enjoin the appellant from revoking its permit for failure to comply with the order. The District Court granted the injunction, holding that the challenged statute was violative of the due process clause as lacking any provision for a notice or hearing before the revocation of the license and for other reasons.

While the Supreme Court reversed, its reasons for reversing are both pertinent and potent here. The Court said (at page 468):

"We are of the opinion that the appellee failed to exhaust its administrative remedy before applying to the District Court for injunctive relief. The granting and revocation of permits is an exercise by the appellant of delegated legislative power." (Emphasis ours.)

The statute of the State of Montana under which the Commissioner was proceeding provided that any interested person dissatisfied with an order of the Commissioner might bring an action against him in the State Court to vacate his order and set it aside as unjust or unreasonable. The Supreme Court said that the function of the State Court under this statute was not solely judicial, the duty being laid on the Court to examine the evidence presented and either to set aside, modify, or affirm the order as the proofs may require. "The legislative process," said the Supreme Court, "remains in-

complete until the action of that Court (the State Court) shall have become final" (Opinion, page 468).

The Supreme Court held the Act constitutional.

Why?

Because it construed the Act to provide that the appellee in his action in the State Court, attacking the decision of the Commissioner, might, upon a proper showing, have obtained a stay of its operation (Opinion, page 468).

And finally the Supreme Court laid down the doctrine which governs our case:

"Where, as ancillary to the review and correction of administrative action, the State statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. . . . But where either the plain provisions of the statute . . . or the decision of the State Court interpreting the Act preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing Court, due process is not afforded. . . ." (Opinion, pages 470, 471).

Under the Emergency Price Control Act, when the Administrator issues a designation or recommendation, there is no provision for an appeal to him or to any Court. When he issues the regulation, any person subject to its provisions may file a protest with him and have a hearing of a sort, and upon denial of his protest may file an appeal or complaint to the Emergency Court. But there is no provision for a stay of the regulation. It remains effective. It remains effective, as we have pointed out, until the Supreme Court shall have passed on it or had the opportunity to pass on it. Therefore, how can you do other but apply the last sentence of the last quotation: When the plain provisions of the statute preclude a supersedeas or stay, due process is not afforded?

In *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292, 57 Sup. Ct. 724, the Supreme Court says:

"Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from Courts when it has been reached with due submission to constitutional restraints. . . . Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' of a fair and open hearing be maintained in its integrity. . . . The right to such a hearing is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored" (Opinion, pages 304, 305).

There may be a question raised as to whether the right to notice and hearing exists in a case where the Administrator is exercising a legislative power and not a judicial power.

In the first place, we say that the Administrator, under this Act, may not be exercising a mere administrative or even a legislative power.

Official action the result of judgment or discretion is a judicial act.

Grider v. Tally, 77 Ala. 422;
Merlette v. State, 100 Ala. 42;
People v. Jerome, 73 N. Y. S. 306.

An act is judicial when it requires the exercise of judgment or discretion by one or more persons, or by a corpo-

rate body when acting as public officers in an official character in a manner which seems to them just and equitable.

State v. Briede, 41 So. 487, 489, 117 La. 183.

When he applies the language of the Act to the circumstances existing in a particular area and designates that area as a defense rental area, he is acting judicially. Whenever he adjudges that it is necessary or proper in order to effectuate the purposes of this Act, and issues a declaration setting forth the necessity for and recommendations with reference to the stabilization or reduction of rents within a particular dense rental area, he is not acting legislatively, but judicially. When he adjudges that rents for housing accommodations within a defense rental area have not been stabilized or reduced in accordance with his recommendations, he is acting judicially. When he establishes "such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act," he is acting judicially.

But it makes no difference what adverb we use—"legislatively" or "judicially." The proceeding in *Porter v. Investors Syndicate*, supra, was purely legislative.

In *Corpus Juris Secundum* (Vol. 16, page 1263 et seq.) the rule is thus announced:

"The right to notice and hearing in an administrative proceeding depends on the character of the proceeding and the circumstances involved, and ordinarily in the case of administrative or legislative functions due process does not require the notice essential in judicial proceedings. . . . However, property cannot be taken under order of an official or board without notice, since the due process clause extends its protection to such a taking of property, and in some proceedings of an administrative character notice and an opportunity for a hearing are essential to due process."

Where boards or commissioners act in a judicial or quasi-judicial capacity, notice is necessary to render their orders due process, and the law authorizing proceedings must require notice or it will be unconstitutional." (Emphasis ours.)

In support of the emphasized portion of the foregoing quotation, the text cites *Morgan v. U. S.*, *supra*; *Investors Syndicate v. Porter*, *supra*.

We realize quite well that it would be a far-reaching decision for your Honors to hold that the attacked sections are unconstitutional. But it would in no sense be disastrous. Congress can amend this law and render it constitutional. We can observe the Constitution contemporaneously with winning the war.

We end this phase of our brief with a quotation from an opinion of a late Chief Justice of Georgia, long deceased, but still venerated by every Georgia lawyer:

"When an error of this magnitude and which moves in so wide an orbit competes with truth in the struggle for existence, the maxim for a Supreme Court, supreme in the majesty of duty as well as in the majesty of power, is not *stare decisis*, but *fiat justitia, ruat caelum.*"

Ellison v. Ry. Co., 87 Ga. 691, 696.

We pass to the second phase of this point.

Does a statute which permits an Administrator to fix rents which are generally fair and equitable in an area selected by him afford due process to the owner of a particular parcel of property, no provision being made for the setting of a fair and equitable rent as to a particular parcel?

In *Block v. Hirsh*, 256 U. S. 135, the Court (four Justices, including the Chief Justice, dissenting) held that the Act of October 22, 1919 (41 Stat. 297), was constitutional.

That Act created a Commission with power, upon notice and hearing to determine whether the rent, service, and other terms and conditions of the use and occupancy of apartments, hotels and other rental property in the District of Columbia, were fair and reasonable, and, if found otherwise, to fix fair and reasonable rents, in lieu.

The Court took pains to say: "Machinery is provided to secure to the landlord a reasonable rent. Section 106."

Here, no machinery is provided to secure to a particular landlord a reasonable rent.

In the same case, at page 158, the Court said:

"While the Act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the Courts are given the last word."

By this Act an owner of a particular parcel of property is not permitted to raise the question as to whether or not the rent fixed by the general regulation is fair and reasonable as to a particular parcel of property. Therefore, the issue cannot be presented to a Court except as it is presented here in an attack upon the Act.

In *Edgar A. Levy Lessing Co. v. Siegel*, 258 U. S. 242; the New York Emergency Housing Laws held constitutional, prohibited the collection of an unreasonable rent. Therefore the question of whether a rent for a particular parcel was reasonable or unreasonable could be judicially determined.

The principle is well settled that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth Amendment.

Old Dearborn Distributing Co. v. Seagram Distillers Corporation, 299 U. S. 183, 192.

Is the right of the owner to fix the price at which he will let it or permits its use by another, any the less an inherent attribute of the property?

In *Wilson v. Brown, Admr.*, supra, the Emergency Court of Appeals dealt with this very question, stating the question thus:

"The question remains whether the Act is constitutional in authorizing the Administrator, as it undoubtedly does, to prescribe maximum rents which, while generally fair and equitable, may in individual cases prevent a landlord from earning a fair return on the basis of the fair market value of his rental property."

The Court held the Act valid as against this attack. With all respect to the Emergency Court, its reasoning in so holding does not seem cogent. They said:

"Furthermore, individualized treatment which may be feasible and workable in a regulation application to the District of Columbia may not be necessarily appropriate in a war-time price and rent control program on a national scale."

Is feasibility to be a test of constitutionality?

The Court further ruled inapplicable the doctrine of Public Utility rate cases, as we read the case, on the basis that this is but a temporary measure. They said:

"The useful life of housing accommodations extends far beyond the contemplated period of rent control. There is, in fact, no appropriation of the housing accommodations at all, and so far as there is a narrow restriction on their use, it is for a very limited period."

The "narrow restriction"—the lowering of rents—has been in effect eighteen months and who can tell how long it will remain in effect—if this high Court deems it to be valid?

They said: "Furthermore, the Act does not require the landlord to continue his property in the market for housing accommodations."

If he removes it from the market, and allows it to remain vacant, he is even the more deprived of his property, of a fair and reasonable return on it. A property owner can live in but one home. Property adapted to residential purposes is not usually suitable for any other purpose.

The Emergency Court referred to the concurring opinion of Justices Black, Douglas and Murphy, in *Federal Power Commission v. Natural Gas Pipe Line Co.*, 315 U. S. 575, 602, as questioning the analogy between fair value upon fair return in rate regulation and the requirement of just compensation in the taking of property by eminent domain.

We are not confronted with the question of how a reasonable rent on a particular parcel of property is to be computed.

The question is that the Act lays down a "standard" of a rent "generally fair and equitable" and does not permit a property owner a fair and reasonable and equitable rent on his property.

The question resolves into this: If the fixing of an unreasonable rent on a parcel of property is a taking of that property within the meaning of the Fifth Amendment, the Act is unconstitutional with respect to this phase of the attack upon it.

Even If the Act Should Be Held to Be Valid, Section 5 (c) of Maximum Rent Regulation Number 26 Is Unconstitutional and Void.

The Proposed Orders of the Rent Director Would Have Been Unconstitutional and Void, but Appellee (Mrs. Willingham), Would Have Been Forced to Obey Them.

Section 5 (c) of the Regulation is:

"The Administrator, at any time on his own initiative, or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

"(1) The maximum rent for housing accommodations under paragraphs (c), (d), or (g) of Section 4 is higher than the rent generally prevailing in the defense rental area for comparable housing accommodations on April 1, 1941 . . ." (Tr., page 11).

Paragraph (c) of Section 4 of the Regulation provided that the maximum rent "for housing accommodations not rented on April 1, 1941, nor during the two months ending on that date, but rented prior to the effective date of this Maximum Rent Regulation, the first rent for such accommodations after April 1, 1941. The Administrator may order a decrease in the maximum rent as provided in Section 5 (c)" (Tr., page 11).

The applicable portions of Section 4 (d) of the regulation are: "(For) housing accommodations changed between those dates (April 1, 1941, and July 1, 1942) so as to result in an "increase or decrease of the number of dwelling units in such housing accommodations . . . the first rent for such accommodations after such construction or change; . . . the Administrator may order a decrease in the maximum rent as provided in Section 5 (c)." (Parenthesis supplied.)

Section 13 (a) (2) of the regulation provides that when used in the Rent Regulation: "The term 'Administrator'

means the Price Administrator of the Office of Price Administration, or the Rent Director or such other person as the Administrator may appoint or designate to carry out any of the duties delegated to him by the Act.

(7 Fed. Reg., page 4909, Section 1388.1713);
(Tr., page 14).

Section 13 (a) (3) of the regulation provides: "The term 'Rent Director' means the person designated by the Administrator as Director of the Defense-Rental Area, or such person or persons as may be designated to carry out any of the duties delegated to the Rent Director by the Administrator" (*Ibid*).

Mrs. Willingham purchased certain property in Macon in May, 1941, which were changed between April 1, 1941 (the general maximum rent date in the area), and July 1, 1942 (the effective date of the regulation), so as to result in an increase of the dwelling units in the housing accommodations. The permitted maximum rents for the three dwelling units (the "first rent for such accommodations after such . . . change") aggregated \$137.50. These permitted maximum rents were, however, subject to be decreased by an order of the Rent Director on his own initiative under the provisions of Section 5 (c) [and Sections 13 (a) (2) and 13 (a) (3)].

In June, 1943, the Rent Director, on his own initiative, notified Mrs. Willingham of his intention to decrease the rentals on these three units to an aggregate of \$90.00. Had he not been restrained by the restraining order of the Superior Court of Bibb County, he would have issued the order reducing the rents. Mrs. Willingham would have had to comply with the order or be subjected to criminal penalties under Section 205 (b) of the Act and penalty suits under Section 205 (e). The former provides for a fine of not more than \$5,000.00, or to imprisonment for not

more than two years. The latter provides for a penalty of \$50.00 for each violation of an order of the Administrator.

In the bill in the State Court Mrs. Willingham attacked Section 5 (e) of the Regulation as unconstitutional and void, for that:

- (1) It would deprive her of her property without due process of law;
- (2) It seeks to delegate to the Administrator and his agents legislative and judicial powers in violation of the Federal Constitution;
- (3) It is too vague and indefinite to be capable of enforcement according to the law of the land having in it no criterion or rules by which the Administrator and his agents are to be guided in orders decreasing maximum rent otherwise allowable, the phrase "the rent generally prevailing in the defense-rental area for comparable housing accommodations on April 1, 1941," being vague, indefinite, and meaningless in the eyes of the law.

(Tr., pages 13, 14.)

These grounds of attack were repeated by Mrs. Willingham in her defenses in the Federal Court.

(Tr., pages 17, 18, 23.)

What has heretofore been said in this brief with respect to the delegation of legislative power by Congress to the Administrator applies with even greater force to the sub-delegation to the Rent Director. The authorities there applicable are, *a fortiorari*, here applicable.

What has heretofore been said with respect to "due process" applies with even greater force to the assailed portions of the regulation.

The Act, if constitutional, empowered the Administrator to fix a maximum rent date of April 1, 1941, in this area.

The Act, if constitutional, empowered the Administrator in his regulation fixing the maximum rent date to provide for such classifications and differentiations, adjustments and reasonable exceptions as might seem necessary or proper in his judgment.

Therefore, the Administrator had the right, if the Act is constitutional, to make provision for housing accommodations which were not rented on April 1, 1941, or which were substantially altered thereafter.

The Administrator is authorized under the Act to appoint such employees as he deems necessary in order to carry out his functions under the Act. He may utilize and establish such regional, local, or other agencies as may from time to time be needed [Act, Section 201.(a)].

The Administrator has not been authorized by the Congress to delegate his powers as he sought to do when he defined the term "Administrator" to include a "Rent Director" appointed by him. The "Administrator" is, at least, known to Congress. Congress made provision for his appointment. But, the "Rent Director" is unknown to Congress. He is the creature of the Administrator. The Administrator, in the regulation, did not stop with delegating. He "legislated." He "enacted" that the Rent Director might on his own initiative order a decrease of the maximum rent otherwise allowable, if rents, in cases such as the present, were higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on April 1, 1941. Even if the Administrator had been authorized by the Congress by constitutional legislation to delegate and to legislate, in so doing he, too, must prescribe legal standards and afford due process to a property owner.

The Rent Director is authorized to reduce rents (in certain circumstances) when the maximum rent is higher than the rent generally prevailing in the Defense-Rental

Area for comparable housing accommodations on April 1, 1941. Here, again, is an unfettered delegation. Here, again, is a roving commission to seek out evils and correct them. It is nothing more nor less than an authorization to the Rent Director to do what he pleases as to the rents of housing accommodations under the circumstances here presented. True, he must be of the opinion that the rents he seeks to reduce are higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on April 1, 1941.

What does the phrase "generally prevailing" mean? Does it mean "market rental value" or does it mean the rent for a majority of like houses? If it means the latter, should the Rent Director take into account the fact that rents for a majority of like houses on April 1, 1941, might have been fixed by leases executed in the summer of 1940, a time when "defense activities had not resulted in increases in rents for such housing accommodations inconsistent with the purposes of the Emergency Price Control Act of 1942"? (Preamble to Regulation 26; Fed. Reg., Vol. 7, page 4905.)

Shall the rents of houses in rural districts of the Area be considered in determining "general prevailing rent"?

Shall allowance be made for normal, warranted, unspeculative increases between the summer of 1940 and April 1, 1941?

If so, what allowance?

What is meant by the phrase "comparable housing accommodations"? Comparable in what respect. As to size and construction and conveniences only, or shall the neighborhood in which they are located be considered?

No standards are laid down for his determination of these questions. They demonstrate what a tangled web we weave when we depart from constitutional mandates.

"Feasibility" is no answer. "Practicability" is no answer. The Constitution provides that a person shall

not be deprived of his property without due process of law. Due process is not afforded when a "Rent Director" is permitted to interfere with valid contracts of rental through the instrumentality of such a provision as the one here attacked.

The Rent Director need await no complaint of a tenant. There was none in this case. He proceeded on his own initiative. True, he gave notice to the owner of his intentions. But he need not have, under the regulation. And, for that reason, too, the provision of the regulation falls. It provides for no notice to the landlord. No hearing is afforded to him by the regulation. Such notice and hearing as he may have had were the results of grace and not of right. This does not constitute due process.

"The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

Roller v. Holly, 176 U. S. 398, 409.

"The law itself must save the parties' rights, and not leave them to the discretion of the Courts as such."

Louisville & Nashville R. Co. v. Stockyards Co.,
212 U. S. 132, 144.

This portion of the Regulation, and those portions of the Act which may be relied on to justify it, also offend another provision of the Constitution: Article III, Section 1. The judicial power of the United States is supposed to be vested in the Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.

Judicial power cannot constitutionally be vested in a Rent Director appointed by an Administrator appointed by the President.

The power vested in the Rent Director by Section 5 (c) of the Regulation is both legislative and judicial. He makes a rule and then enforces it by order or judgment.

The landlord must obey that order or subject himself to criminal and civil penalties.

Revenue Act of 1926, Section 280, authorizing the Commissioner of Internal Revenue to assess and collect the liability at law or in equity of a transferee or property of a taxpayer in respect of the tax imposed on taxpayers, held a denial of due process of law, in violation of Constitutional Amendment V, and an attempt to vest judicial power in the Commissioner of Internal Revenue, in violation of the Constitution, Article III, Section 1.

Owensboro Ditcher & Grader Co. v. Lucas, 18 Fed. (2d) 798 (1);

Mid-Continent Petroleum Corp. v. Alexander, 35 Fed. (2d) 43 (1).

We are not unmindful of Oceanic Navigation Co. v. Stranahan, 214 U. S. 320, 338, and the cases cited therein. The rule of those cases is;

It is within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.

Here Congress has not imposed the obligations. The obligations are imposed by the Rent Director when he adjudicates first that a rent is too high, and, second, what a proper rent shall be.

Such an order passed by the Rent Director could not, under the terms of Section 204 (d), be assailed by any Court except the Emergency Court of Appeals after the filing and denial of a protest in the manner hereinbefore considered.

We do most respectfully submit that the order of the trial Judge, holding the regulation invalid, was justified and legally correct.

By Reason of the Provisions of Section 265 of the Judicial Code (U. S. C. A., Title 28, Section 379), the District Court of the United States for the Middle District of Georgia Had No Jurisdiction to Grant the Writ of Injunction to Stay the Proceeding Filed by Appellee, Mrs. Willingham, in the Superior Court of Bibb County, Georgia.

“The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.”

U. S. C. A., Title 28, Section 379.

It may seem that this point is illogically placed in this brief—that it should have been the first point stated and argued. It was the first special point made in the motion to dismiss in the Court below. There we asserted:

“An injunction should not be granted in this cause for the reason that such grant would be violative of Section 265 of the Judicial Code (United States Code Annotated, Title 28, Section 378)” (Tr., page 17).

The Court below (and we) were confronted with two decisions of Circuit Courts of Appeals, Henderson, Administrator, v. Fleckinger et al., 136 Fed. (2d) 381, and Brown, Administrator, v. Wright et al., 137 Fed. (2d) 484.

In the Fleckinger case (a decision of the Fifth Circuit Court of Appeals) the third headnote is:

“Provision of Judicial Code forbidding the grant of an injunction by Court of United States to stay proceedings in State Court is modified by later provision of Emergency Price Control Act, authorizing Price Administrator to make application to appropriate Court for order enjoining acts constituting violation of the Act.”

At page 382 of the opinion, Judge Sibley, speaking for the Court, said:

"Section 265 of the Judicial Code, forbidding the grant of an injunction by a Court of the United States to stay proceedings in a State Court, must be considered as modified by the later provisions of Section 205 (a) of the Emergency Price Control Act. This latter Act formulated important Federal policies, and charged the Administrator with executing them, and armed him with injunction as his main weapon. We do not think it was intended that his use of it is to be denied because a proceeding in a State Court is contravening the Federal policies. The Federal Act, assuming its constitutionality, is a part of the supreme law of the land, and the Courts ought to carry it out fully, using the injunctive process it prescribes. We think this case, though not appearing to be in its circumstances a flagrant violation of the Act, if a violation at all, ought to be tried on its merits." (Emphasis ours.)

Judge Parker, speaking for the Court (Judge Northcott dissenting), in *Brown v. Wright*, supra, while developing the issue more fully, reached the same conclusion. He concluded:

"In any event, the provision of the Emergency Price Control Act should be construed as modifying or creating an exception to the general provisions of the statute."

The provisions of the Act mentioned by both Courts are those of Section 205 (U. S. C. A., Title 50, App., Section 925).

Section 205 (a) provides:

"Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of Section 4 of this Act

(Section 904 of this Appendix), he may make application to the appropriate Court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." (Emphasis ours.)

It will be noted that this subsection uses the expression "the appropriate Court."

Section 205 (c) [U. S. C. A., Title 50, App., Section 925 (C)] provides that the District Courts shall have jurisdiction, concurrently with State and Territorial Courts, of proceedings under the section. (District Courts have exclusive jurisdiction of criminal proceedings.)

Section 4 of the Act (U. S. C. A., Title 50, App., Section 904) in subsection (a) thereof makes it unlawful for any person to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act in violation of a regulation or order issued under Section 2 of the Act (Ibid., Section 902). (There are other provisions not applicable here.)

We contend:

First: The provisions of Section 205 (a) of the Act do not modify or create an exception to the provisions of Section 265 of the Judicial Code;

Second: Even if those provisions do so modify or create an exception to the provisions of Section 265 of the Judicial Code, they create such an exception only in a case where the litigant in the State Court was engaging in acts or practices condemned by Section 4 of the Act; and not in a case where the litigant in the State Court was proceeding to enjoin the Rent Director from interfering with her contractual relationship with her tenants, by virtue of an Act of Congress assailed as unconstitutional.

We call attention to the cases of *Toucey v. New York Life Ins. Co.*, and *Phoenix Finance Corporation v. Iowa-Wisconsin Bridge Co.*, 314 U. S. 118⁶ decided November 17, 1941, amended on denial of rehearing December 15, 1941. These opinions were written by Mr. Justice Frankfurter, with Mr. Justice Reed, Mr. Justice Roberts and the Chief Justice dissenting.

The majority opinion pointed out:

- (a) Section 265—"a limitation on the power of Federal Courts dating almost from the beginning of our history and expressing an important Congressional policy—to prevent needless friction between State and Federal Courts—is derived from Section 5 of the Act of March 2, 1793" (page 129);
- (b) "Regardless of the various influences which shaped the enactment of Section 5 of the Act of March 2, 1793, the purpose and direction underlying the provision is manifest from its terms: proceedings in the State Courts should be free from interference by Federal injunction. The provision expressed on its face the duty of 'hands off' by the Federal Courts in the use of injunction to stay litigation in a State Court" (page 132).
- (c) "The language of the Act of 1793 was unqualified: . . . nor shall a writ of injunction be granted to stay proceedings in any Court of a State . . ." (page 132).
- (d) In the course of one hundred and fifty years Congress has made few withdrawals from this sweeping prohibition:
 - (1) Bankruptcy proceedings, the only legislative exception which has been incorporated directly into Section 265;
 - (2) Removal of actions;
 - (3) Limitation of ship owners' liability;

(4) **Interpleader.** The Interpleader Act contained a distinct provision, "Notwithstanding any provision in the Judicial Court to the contrary, said (District Court) shall have power to . . . issue an order of injunction against each (claimant) enjoining them from instituting or prosecuting any suit or proceeding in any State Court or in any other Federal Court";

(5) **Frazier-Lemke Act** (which was a quasi-bankruptcy Act).

The Act of 1851 [Limitation of Ship-owners' Liability (3) supra] provided that after a ship owner transfers his interest in the vessel to a trustee for the benefit of the claimants "all claims and proceedings shall cease." That, too, was a quasi-bankruptcy Act.

Now it is asserted that, in the face of this opinion, about one month later the Congress enacted the Emergency Price Control Act of January 30, 1942, and by Section 205 (a) created an implied exception to the one hundred and fifty year old statute known as Section 265 of the Judicial Code. Should Section 205 (a) be considered as an implied exception to Section 265 of the Judicial Code, when just a few weeks before its enactment, while, no doubt, it was being debated in the halls of Congress, this Court had used this language:

"The provisions of Section 265 have never been the subject of comprehensive legislative re-examination. Even the exceptions referable to legislation have been incidental features of other statutory schemes, such as the Removal and Interpleader Acts. **The explicit and comprehensive policy of the Act of 1793 has been left intact.** . . . Section 265 is not an isolated instance of withholding from the Federal Courts equity powers possessed by Anglo-American Courts. As part of the delicate adjustments required by our federation, Congress has rigorously controlled the

'inferior Courts' in their relation to the Courts of the States. . . . The guiding consideration in the enforcement of the Congressional policy was expressed by Mr. Justice Campbell, in *Taylor v. Carryl*, 20 How. 583: 'The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision.' We must be scrupulous in our regard for the limits within which Congress has confined the authority of the Courts of its own creation."

So, we assert, in the light of this decision, that Section 205 (a) of the Act does not create an implied exception to Section 265 of the Judicial Code.

If, however, the Court should deem it to be an implied exception, how far does the exception extend?

By the very terms of Section 265 the Administrator may apply to the appropriate Court for an injunctive order only when a person has engaged in or is about to engage in acts or practices which constitute or will constitute violations of Section 4 of the Act, to wit, demanding or receiving any rent for any defense area housing accommodation, or any other act violating a rent order of regulation.

Is the filing of an injunction by a property owner in an honest effort to test the validity of an Act of Congress and actions of Administrators thereunder an "act or practice" condemned by Section 4 of the Act?

If not, then even the "implied exception" will avail the appellant nothing.

The Provisions of Section 204 (d) of the Emergency Price Control Act, Purporting to Divest the Superior Court of Bibb County, Georgia, of Jurisdiction and Power to Consider the Validity of a Rent Regulation or to Stay, Restrain, Enjoin or Set Aside Any Provision of the Act or Any Regulation or Order Issued Thereunder, Are Unconstitutional and Void.

We assert that the Congress of the United States has no constitutional authority to enact any such provisions as those of Section 204 (d) just stated.

This point was made in the lower Court (Tr., pages 19, 24).

With respect to it the Court below said:

“The Court does not deem it necessary to decide and does not decide whether Section 204 (d) of the Act is unconstitutional in so far as it operates or may operate to restrict the jurisdiction of the Superior Court of Bibb County, Georgia, in the case of Mrs. Kate C. Willingham v. Andrew J. Lyndon, Rent Director, No. 7508, October Term, 1943” (Tr., page 39).

We do not know that it will become necessary for this Court to decide that point in this case. We shall discuss it briefly.

In Stanley W. Taylor v. Brown, Admr. (E. C. A., No. 10, decided by the Emergency Court of Appeals July 15th, 1943, 137 Fed. [2d] 654), that Court said:

“It is equally clear that Congress may vest exclusive jurisdiction in Federal Courts over causes arising under a Federal statute. The Moses Taylor, 71 U. S. (4 Wallace) 411.”

That statement begs the question. [Congress has not by this statute vested exclusive jurisdiction in the Federal

Courts over causes arising under it. By the express terms of Section 205 (c), State Courts are given concurrent jurisdiction with the Federal Courts of all proceedings brought under that section (except criminal proceeding.)] The true rule is that Congress may vest exclusive jurisdiction in Federal Courts over causes arising under a constitutional Federal statute. Congress cannot divest the State Courts of the power to determine whether jurisdiction which once was theirs has been constitutionally taken away. Congress has the authority under the powers delegated to it to deprive State Courts of jurisdiction to entertain any cause of action involving those delegated powers, but Congress has not the right (because of the Tenth Amendment and Supremacy Clause) to deprive the State Courts of the power of deciding whether or not the asserted Congressional power has been constitutionally exercised. The decision of the State Court would, of course, be subject to the final decision of the Supreme Court of the United States (Cf. Southern Railway Company v. Painter, 314 U. S. 155, 159-160).

Under Article I, Section 8, paragraph 4, of the Constitution, Congress has the power to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies. Under Article III, Section 2, the judicial power of the United States extends to all cases, in law and equity, arising under the Constitution and the laws of the United States. Therefore, clearly, the Congress can constitutionally deprive the State Courts of jurisdiction over these subjects of naturalization and bankruptcy—subjects of Congressional power beyond dispute. That is the rationale of the decision in "The Moses Taylor," supra.

But suppose Congress, purportedly acting under the Commerce clause of the Constitution, should enact a Federal Workmen's Compensation Law, and deprive the State

Courts of jurisdiction to entertain any suits based on tort claims of employees against employers, could the Congress deprive the State Court of the power of deciding whether the Act of Congress was within its delegated powers?

The answer, we think, is No—because the State Court would have the right initially to decide whether Congress was acting within its power, **not** when it deprived the State Court of jurisdiction, **but** when it sought to regulate the relationship between employer and employee.

For the sake of example, take the First Employers' Liability Act, which was declared unconstitutional by this Court in The Employers Liability Cases, 207 U. S. 463, for the reason that it was addressed to all common carriers engaged in interstate commerce, and imposed a liability upon them in favor of any of their employees, without regard to the nature of the business at the time of the injury. Suppose that Act had conferred exclusive jurisdiction of suits under it to the Federal Courts. Suppose further the widow of an employee killed in the line of his duties with a carrier had sued under the State law as it existed prior to the passage of the Federal Law, and been met with the defense that her rights were regulated by the Federal Act. Would not the State Court have had the right to determine whether the Federal Act was constitutional and validly superseded the State Law?

Suppose Congress under some imagined power should enact a uniform divorce law that State Courts should no longer grant divorces, or consider the validity of the Congressional Act. Could that law possibly deprive the State Courts of jurisdiction to determine its constitutionality if it were plead by a respondent in a divorce action in the State Court?

The answer again is No, and the reason for the answer is the Tenth Amendment to the Constitution and the Su-

premacy Clause of the Constitution which provides that "This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme law of the land."

If Congress enacts a law not in pursuance of the Constitution, it cannot deprive the State Court of the right so to say—subject to the final decision of the Supreme Court of the United States. The Constitution, and not the law, governs. The created cannot make itself superior to the creator.

"The power reserved to the States, under the Constitution (Amendment 10), to provide for the determination of controversies in their Courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution."

Healy v. Ratta, 292 U. S. 263, 270;

Chase National Bank v. Citizens Gas Co., 314 U. S. 63, 76-77.

CONCLUSION.

We do not question the right of the Congress to enact a statute controlling rents in time of war.

We do strenuously deny the right of Congress to enact the Statute of January 30, 1942. We do strenuously assert that it is unconstitutional, and that the acts of the Administrator and the Rent Director, complained of in the basic suit here involved, are unconstitutional.

We do earnestly hope that this Court will continue to hold that the Constitution is to be observed and maintained in time of war, as well as in times of peace.

"To preserve the permanent Constitutional liberties of the people is the sworn duty of Courts, and is not

to be compared with some good end which might result from permitting government agencies to exercise unauthorized power by regulation because of so temporary emergency."

Judge Deaver's Opinion (Tr., page 38).

Respectfully submitted,

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APPENDIX.

ILLUSTRATIVE DESIGNATION AND RENT DECLARATION.

Establishing Defense-Rental Areas and Recommending Maximum Rents.

Birmingham—Designation of the Birmingham Defense-Rental Area and Rent Declaration Relating to That Area.*

(Preamble.) The Emergency Price Control Act of 1942 provides that whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of that Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-rental area housing accommodations within a particular defense-rental area; and that if within sixty days after the issuance of such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized, or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of that Act; and

In the judgment of the Administrator, defense activities have resulted in an increase in the rents for housing accommodations in the area described below inconsistent with the purposes of the Emergency Price Control Act of 1942; and

* Designation No. 3, issued 3-2-42, 7 FR, 1677.

In the judgment of the Administrator, it is necessary and proper in order to effectuate the purposes of said Act to issue this declaration, setting forth the necessity for, and recommendations with reference to, the stabilization and reduction of rents for defense-area housing accommodations within the defense-rental area described below;

Therefore, under the authority vested in the Administrator by said Act, this designation and rent declaration is issued.

Section 1388.101. Designation. The following area is designated by the Administrator as an area where defense activities have resulted in an increase in the rents for housing accommodations inconsistent with the purposes of the Emergency Price Control Act of 1942 and shall constitute a defense-rental area to be known as the "Birmingham Defense-Rental Area":

In the State of Alabama, the County of Jefferson in its entirety.

Section 1388.102. Necessity. The necessity for the stabilization and reduction of rents for defense-area housing accommodations in said defense-rental area is as follows:

The designated area is and has been the location of war production industries. The increase in employment reflecting the expansion of defense activities and the influx of production workers and their families have resulted in an acute shortage of rental housing accommodations in the local market. The President has found that an acute shortage of housing exists or impends in the Birmingham area under Public No. 849, 76th Congress, 3rd Session (Lanham Act), and Public No. 24, 77th Congress, 1st Session (Title VI, National Housing Act). Birmingham has been placed on the list of Defense Housing Areas in which builders may secure priority ratings on critical materials for residential construction.

Surveys in the Birmingham area have reported low vacancy ratios for rental housing accommodations, indicative of the abnormality of the local market. New construction in this area by private industry and by the Government has not been sufficient to restore a normal rental market for housing accommodations.

Defense activities have resulted in substantial and widespread increases in rents, affecting most of the rental housing accommodations in the Birmingham area. Official governmental surveys of rental change conducted in this area have shown a marked upward movement in the general level of residential rents during the past two years. By reason of these substantial increases the rents prevailing in the Birmingham area are not generally fair and equitable.

Section 1388.103. Recommendations. The Administrator has ascertained and given due consideration to the rents prevailing for housing accommodations within the designated areas on or about April 1, 1941. It is his judgment that prior to April 1, 1941, defense activities had not yet resulted in increases in rents for such housing accommodations inconsistent with the purposes of the Act, but did result in such increases commencing on or about that date. The Administrator has considered, so far as practicable, relevant factors deemed by him to be of general applicability, including fluctuations in property taxes and other costs. It is the judgment of the Administrator that the recommendations hereinafter set forth are generally fair and equitable and will effectuate the purposes of the Act.

Recommendations with reference to the stabilization and reduction of rents for defense-area housing accommodations in said defense-rental area are as follows:

(a) Maximum rents for housing accommodations should be:

- (1) For housing accommodations rented on April 1, 1941, the rent for such accommodations on that date.
- (2) For housing accommodations not rented on April 1, 1941, but rented at any time within the six months ending on that date, the last rent prior to said date.
- (3) For housing accommodations not rented on April 1, 1941, nor within the six months ending on that date, the first rent after that date, but in no event more than the rent generally prevailing in the Birmingham Defense-Rental Area for comparable housing accommodations on April 1, 1941.

(b) Provision consistent with the purposes of the Emergency Price Control Act of 1942 should be made for the determination, adjustment, and modification of the maximum rent for the following classifications of housing accommodations, but in principle maximum rents for such housing accommodations should not be greater than the rent for comparable accommodations prevailing in the Birmingham Defense-Rental Area on April 1, 1941:

- (1) For housing accommodations completed and first rented after April 1, 1941, or changed after April 1, 1941, in any manner resulting in an increase or decrease in the number of units in such accommodations, or substantially altered by an improvement or deterioration subsequent to April 1, 1941.
- (2) For housing accommodations owned by the United States or any agency thereof or by the State of Alabama or any political subdivision thereof, or agency of any of the foregoing.
- (3) For substantial increase or decrease of services in connection with housing accommodations subsequent to April 1, 1941.

(4) In cases where the rent on April 1, 1941, was materially affected by the blood, personal or other special relationship between landlord and tenant or was determined by a written lease which had been in force for six months or more on said date and such rent was greater or less than the rent for comparable accommodations in the Birmingham Defense-Rental Area on April 1, 1941.

(c) Appropriate provision should be made with respect to evictions, other actions relating to the recovery of possession, and the modification of services; and appropriate provision should be made to prevent the circumvention or evasion of maximum rents by any method whatever.

Section 1388.104. Maximum rent regulation. If within sixty days after the issuance of this declaration, rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by state or local regulation, or otherwise, in accordance with the foregoing recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of the Emergency Price Control Act of 1942.

Section 1388.105. Effective date. This designation and rent declaration (Sections 1388.101 to 1388.105, inclusive) is effective March 2, 1942.

Leon Henderson,
Administrator.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 464

CHESTER BOWLES, AS ADMINISTRATOR OF THE OFFICE
OF PRICE ADMINISTRATION,

Appellant,

vs.

MRS. KATE C. WILLINGHAM AND J. R. HICKS, JR.

REPLY BRIEF FOR APPELLEES.

CHARLES J. BLOCH,
Counsel for Appellees.

HALL & BLOCH,
Macon, Georgia.
Of Counsel.

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REPLY BRIEF FOR APPELLEES.

This reply brief is filed pursuant to permission granted by the Court at the conclusion of the oral argument.

1. *The District Court, if it had jurisdiction of the case at all, had jurisdiction to determine the constitutionality and validity of the Emergency Price Control Act, Maximum Rent Regulation No. 26, and all contemplated orders thereunder.* (Original Brief, page 7.)

We call attention to the recent case of *Allen Pope v. The United States*, No. 45704, decided by the Court of Claims of the United States, January 3, 1944. We refer also to an article which appears in the American Bar Association Journal of January, 1944; Vol. 30, pp. 17. *et seq.*: "Can a Trial Court of the United States be completely deprived of the power to determine Constitutional Questions?"

2. The rent control sections of the Emergency Price Control Act are unconstitutional and void being violative of Article I, Section 1, of the Constitution of the United States. (Original Brief, p. 21.)

A careful reading and study of the cases cited by the appellant at page 21 (note 9) of his brief suggests this thought: In that group of cases, of which the *Tagg Brothers* and *Moorehead, Union Bridge Co., Monongahela Bridge Co.* cases are types, the application of legal criterion must have been justified by a prior hearing held upon notice, and the words of the criteria must be construed as if the phrase "as determined by a hearing held under the terms of the statute" modified the particular criterion. For example, in the *Bridge* cases (Appellant's Brief, page 22, note 9), the criterion is, "unreasonable obstruction to navigation." But the determinations of the fact that a bridge was an unreasonable obstruction to navigation must have been preceded by a hearing held after notice to the bridge owner.

"That the Act of 1899 did not invest the Secretary of War with arbitrary power in the premises, since in reference to any bridge alleged to constitute an unreasonable obstruction to navigation he was bound, before making any decision or taking final action, to notify the parties interested of any proposed investigation by him, give them an opportunity to be heard and allow reasonable time to make such alterations as he found to be necessary to free navigation."

Monongahela Bridge Co. v. United States, 216 U. S. at page 193.

In *Mahler v. Eby*, 264 U. S. 32, where the standard was "undesirable resident," the Court said at page 40: "Our history (since 1802) has created a common understanding of the words 'undesirable residents' which give them the quality of a recognized standard. In the *Marshall Field* case

(143 U. S. 689) the Court distinctly pointed out, speaking of the Tariff Act under attack, "nothing involving the expediency or the just operation of such legislation was left to the determination of the President" (Cited in *Union Bridge Co.* case, 204 U. S. at p. 382).

"The true distinction is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, *and* conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." (Judge Ranney of the Supreme Court of Ohio, quoted by this Court in *Union Bridge Co.* case, 204 U. S. at page 383.)

"It will not be contended that Congress can delegate to the Courts or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. * * * The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, *from those of less interest*, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

(Chief Justice Marshall in *Wayman v. Southard*, 10 Wheat. 42, 43, 6 L. Ed. 262, 263, 1825.)

You have drawn the line in the *Schechter* case, in the *Ryan* case, as contrasted to the *Rock Royal* case, the *Adkins* case.

You are now called upon again to draw the line; to say that the broad powers conferred upon the Administrator are powers which are strictly and exclusively legislative, powers dealing with a subject of the highest import, which must be regulated by the Congress itself.

3. *The Rent Control sections of the Emergency Price Control Act are unconstitutional and void, being violative*

of the Fifth Amendment to the Constitution of the United States.

(Original Brief, Page 53.)

The appellant says: "With respect to the basic rent regulation itself, there is no constitutional requirement that its issuance be preceded by notice and hearing" (Appellant's Brief, p. 14). For that statement there is cited *Bi-Metallic Co. v. Colorado*, 239 U. S. 441, 445. That case is also considered at pages 33 and 34 of Appellant's brief. That case is the answer used by the Emergency Court of Appeals to this attack upon the act. (See *Avant, et al. v. Bowles*, Nos. 63 and 64 E. C. A., decided December 31, 1943).

We submit that that case is no answer to the problem raised by this attack upon the statute.

We most respectfully suggest to the Court that the record in that case be carefully examined. We have examined the record as closely as time has permitted and we allude to these two excerpts from that record:

"Furthermore, the Tax Commission by §15 of the Act is expressly authorized to receive complaints, and carefully examine into all cases, where it is alleged that property subject to taxation, has not been assessed, or has been fraudulently or for any reason improperly assessed, etc. Here is an express provision for an opportunity to be heard which, with the notice given by the statute of time and place of the meeting of the Tax Commission, surely constitute due process of law."

Opinion of White, D. J., at page 62 of transcript
Bi-Metallic case.

An examination of the brief of counsel for the defendants in the *Bi-Metallic* case will show that their defense and the ultimate decision of the Court rested upon the principle of *Turpin v. Lemon*, 187 U. S. 51: "Exactly what due process

of law requires in the assessment and collection of general taxes has never yet been decided by this Court, although we have had frequent occasion to hold that in proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceeding, as well as an opportunity to defend is essential.

* * * But laws for the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary. (Cited in brief for Defendant in Error in *Bi-Metallic* case at page 27, thereof.)

We have not a case involving the collection or assessment of general taxes. We have a case where the Congress has sought to authorize an administrator to segregate various areas of the United States from the rest of their country, call them "defense rental areas," and fix their rents all without any notice or hearing prior to the effective date of the regulation.

It seems to us, that we are governed by the rule embraced in the language of the Court in *Embree v. Kansas City Road District* (240 U. S. 242): "Where a taxing district is not established by the legislature, but by exercise of delegated authority, there is no legislative decision that its location, boundaries and needs are such that the lands therein are benefited, and it is essential to due process of law that the landowners be accorded an opportunity to be heard on the question of benefits."

In *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, at page 167, the Court said: "The legislature not having itself described the District, has not decided that any particular land would or could possibly be benefited as de-

scribed, and, therefore, it would be necessary to give a hearing at some time to those interested, upon the question of fact whether or not the land or any owner which was intended to be included, would be benefited by the irrigation."

"*The legislature, when it fixes the district itself,* is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question" (*Ibid.*, p. 174).

But:

"Unless the legislature decides the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken" (*Ibid.*, p. 175).

See also *Southern Ry. Co. v. Virginia*, 290 U. S. 190.

The appellant, we understood, answered this case by saying that it applied only to a few corporations. Is that an answer? The statute (290 U. S. p. 192) applied to every grade crossing in Virginia, and therefore to every railroad company operating in Virginia. Regulation 26 applies to every owner of rental property in the Macon defense rental area—of course, these are more numerous than there are railroads in Virginia but—is that the test? If so, to what number of people must an administrative regulation apply before notice and hearing ceases to be necessary as an attribute of procedural due process?

The appellant says we had notice prior to the issuance of the proposed *order*. That is not the test. The scope of the hearing on the issuance of the "order" would not and could not have embraced the basic questions, but would have simply been an application of the regulation previously issued. The Court will, of course, have noted that the

"procedural regulation" is quite a different document from the "Rent Regulation". The Rent Regulation is the administrator's basic, substantive statute in a defense rental area. The "Procedural Regulation" is his code of procedure under that substantive regulation. The act itself compels him to issue the Rent Regulation in some form if he decrees rent control in a given area. The act does *not* compel him to issue the procedural regulation, and the one exhibited in the appendix to appellant's brief was not issued until January 12, 1943, six months after the issuance of the Rent Regulation. (There was a previous one, but whether in it the administrator deigned to give any kind of a hearing, we do not recall.)

"If the Statute did not provide for a notice in any form, it is not material that as a matter of grace or favor, notice may have been given of the proposed assessment. It is not what notice uncalled for by the statute, the taxpayer may have received in a particular case that is material but the question is whether any notice is provided for by the Statute."

Security Trust & Safety Vault Co. v. Lexington,
203 U.S. at p. 33.

During the argument of the *Yakus* and *Rottenberg* cases on January 7th, Mr. Justice Jackson asked counsel for a distinction of the *Falbo* case: (*Nick Falbo v. The United States*, decided Jan. 3, 1944, No. 73, Oct. Term, 1943). The great distinction is shown by the following language of Mr. Justice Black at page 3 the pamphlet opinion: "The registrant may contest his classification by a personal appearance before the local board, and if that board refuses to alter the classification by carrying his case to a Board of Appeal, and thence in certain circumstances to the President *only after he has exhausted this procedure is a protesting registrant ordered to report for service.*

Conclusion.

In the argument of the *Rottenberg* and *Yakus* cases we understood the Solicitor General to say that there was no constitutional right to make a profit.

This Court has said as late as 1927 in the case of *Tyson & Brother v. Banton*, 273 U. S. 418, 429, "The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, and, as such, within the protection of the due process of law clauses of the 5th and 14th Amendments."

There is no provision in this law which provides that the owner may receive a fair return on his property, nor is there any provision in the regulation or procedural regulation authorizing him to petition for an adjustment on this ground.

Block v. Hirsh, 256 U. S. 135, the Court by a 5 to 4 decision upheld the District of Columbia rent laws of the last war. But, in that law, by §106 of the act machinery was provided to secure to the landlord a reasonable rent (op. p. 157).

"The decision would for the first time in our history set aside a delegation of authority to an independent administrative agency" (Appellant's brief, p. 17).

Has there ever in our history been such a sweeping delegation of authority by the Congress to an administrator?

Never before in our history has Congress delegated to a single individual the right to determine, without prior notice or hearing, the particular segment of the United States in which rents should be stabilized or reduced; the right to determine, without prior notice or hearing, the period of the regulation; the right to determine, without prior notice or hearing, the character of the regulation to be imposed; the right to determine, without prior notice or hearing,

rents which may or may not provide a reasonable return to the owner on the value of his property; the right to fix rents which if continued in force may bankrupt property owners in those areas selected by the administrator.

It is an awful responsibility we know, for a Court to set aside an Act of Congress, particularly in time of war. It is almost as great a responsibility for me as a member of the bar of this Court to plead that you do so. Deliberately, we omitted from our brief any reference to those cases which pronounce the doctrine that the mandates of Constitution are to be obeyed in times of war as well as in times of peace. Their principle is fundamental and axiomatic. But when an Act of Congress is sought to be upheld on the ground of "practicability,"—of "feasibility"—we can only reply: (Appellant's Brief, p. 19) Is the test of "Constitutionality" to be swept aside, even in war time, and that of "practicability," of "feasibility" substituted?

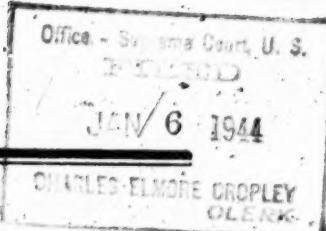
Congress *may* regulate rents in times of war. Congress *should* regulate rents in times of war. But, in so doing, Congress should follow the mandates of the Constitution. This Act of Congress expires by limitation of time in a very few months. May you by your opinion in this case let it be known that if rent control is continued, such continuation must be in accordance with a law which embodies the basic principles of constitutional government.

Respectfully submitted,

CHARLES J. BLOCH,
Attorney for Appellees.

(9866)

FILE COPY



IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 464

CHESTER BOWLES, As Administrator of the Office of
Price Administration,

Appellant,

against

MRS. KATE C. WILLINGHAM and J. R. HICKS, JR.,

Appellees.

BRIEF OF AMICI CURIAE

MAXWELL C. KATZ,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943

No. 464

CHESTER BOWLES, As Administrator of the Office of
Price Administration,

Appellant,
against

Mrs. KATE C. WILLINGHAM and J. R. HICKS, JR.,

Appellees.

BRIEF OF AMICI CURIAE

Preliminary Statement

The above action was brought by the Price Administrator as Complainant in the United States District Court For The Middle District of Georgia, Macon Division, based upon an alleged violation of a rent regulation purportedly issued pursuant to the Emergency Price Control Act of 1942 (56 Stat. 23).

Appellees herein moved to dismiss the action on the ground that the Act and the regulation creating the right of action are unconstitutional and void.

The court below granted the motion to dismiss and held that the rent provisions of the Emergency Price Control Act of 1942 and the regulations promulgated pur-

suant thereto are unconstitutional and invalid, for the reasons stated in the opinion of the same court in the case of *Payne v. Griffin*, 51 Fed. Supp. 588.

A direct appeal was taken by the Appellant and probable jurisdiction was noted by order of this Court, dated November 15, 1943.

Questions Presented On This Hearing

- (1) Where enforcement proceedings are instituted by the Price Administrator under the Emergency Price Control Act and Regulations issued pursuant thereto, may the Court, which has been selected by the Price Administrator as the forum for the enforcement proceedings, properly preclude the defendants from interposing and proving every defense available to it in law and equity challenging the validity of the regulations upon which the enforcement proceedings are based?
- (2) Does not Section 204 (d) of the Emergency Price Control Act of 1942, which the Government contends vests exclusive jurisdiction in the Emergency Court of Appeals to determine the validity of any regulation or order issued under Section 2:
 - (a) Infringe upon the judicial power vested exclusively in the judicial department of the Government by Article III, Section 1, of the Constitution of the United States?
 - (b) Deprive appellants in this case and other persons, that may be similarly situated in enforcement proceedings, civil and criminal, of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States?

- (3) Do the administrative remedies provided for by the Emergency Price Control Act of 1942 accord to persons affected thereby, due process of law, and does said Act contain adequate provisions for judicial protection and judicial review?
- (4) Is the Emergency Price Control Act of 1942 unconstitutional, in that it illegally delegates legislative powers to the Price Administrator, in violation of Article I, Section 1, of the Constitution of the United States?

Summary of Argument

POINT I—Section 204 (d) of the Act, as construed by the appellant, precludes courts, selected by the Price Administrator as the forum for enforcement proceedings instituted by him, from hearing any defenses interposed by the defendant in such cases which challenge the validity of any regulation or order issued or claimed to have been issued under Section 2 of the Act and which are the basis for the enforcement proceeding and, therefore, infringes upon the judicial power vested exclusively in the judicial department of the Government by Article III, Section 1, of the Constitution of the United States.

POINT II—Since the administrative remedies provided for by the Emergency Price Control Act of 1942 do not afford adequate protection to parties affected thereby and do not provide for adequate judicial review, Section 204 (d) of the Act, as construed and applied by the Administrator would deprive defendants in enforcement proceedings under the Act of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

POINT III—Since the Emergency Price Control Act of 1942 is not in itself a statute which by its terms reg-

ulates prices or rents, but is merely an authorization to the Price Administrator to so regulate, without providing for any standard, rule or method whereby such maximum prices or rents shall be established, it is an unlawful delegation by Congress of legislative powers in contravention of the provisions of Article I, Section 1, of the Constitution of the United States.

POINT IV—The contentions and authorities relied upon by the Government are not controlling.

POINT I

Section 204 (d) of the Act, as construed by the appellant, precludes Courts, selected by the Price Administrator as the forum for enforcement proceedings instituted by him, from hearing any defenses interposed by the defendant in such cases, which challenge the validity of any regulation or order issued or claimed to have been issued under Section 2 of the Act and which are the basis for the enforcement proceeding and, therefore, infringes upon the judicial power vested exclusively in the judicial department of the Government by Article III, Section 1, of the Constitution of the United States.

Judge Deaver, in the opinion of the court below, presents an admirable discussion of the constitutional limitation on the power of the legislature to interfere with the inherent powers of courts.

We submit that the well-reasoned opinion of the court below and the authorities contained in this point demonstrate that the construction that the Government would place upon Section 204 (d) of the Act is untenable.

Section 204 (d) of the Act provides as follows:

"The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders,

of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2; of any price schedule effective in accordance with the provisions of Section 206 and of any provision of any such regulation, order or price schedule."

It will be noted that jurisdiction may be conferred upon the Emergency Court of Appeals only by the voluntary act of a party who must first have filed a protest with the Price Administrator (Sections 203, 204 (a) of the Act).

Section 205 of the Act specifically confers jurisdiction upon the district courts in any action for enforcement brought by the Administrator.

This Court has already held in *Lockerty v. Phillips*, 319 U. S. 182, 63 Sup. Ct. 1019, that a district court does not have jurisdiction to enjoin the enforcement of price regulations prescribed by the Administrator. In doing so, however, the Court specifically stated that it did not pass upon

"whether or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations under it" (p. 189).

Equally emphatic was the opinion of this Court in its statement that-

"A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored" (p. 188).

The question expressly before this Court now, is whether Section 204(d) of the Act, after the submission of an enforcement proceeding to the jurisdiction of the Court, in an action brought by the administrator, does not deny

all opportunity for judicial determination of an asserted constitutional right, and deny to the Court an opportunity from making "a judicial determination of an asserted constitutional right".

Clearly, under the form of government established by our Constitution, it is within the province of the judiciary to say what the law is, and a legislative enactment may not validly shackle the inherent powers of a court and compel the rendering of an opinion based upon judicial investigation and reflection which is legislatively limited.

Early in the history of this Court, it was declared that the unrestricted power of judicial review was an essential attribute of the judicial power given to the courts by the Constitution.

In *Marbury v. Madison*, 1 Cranch 137 (1803), Chief Justice Marshall said (at p. 177):

"It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

To the same effect see:

Ableman v. Booth, 21 How. 506 (1858), 520;
Gordon v. United States, 117 U. S. 697 (705).

This right flows from the Constitution itself.

Article III; Section 1, of the Constitution provides:

"The judicial power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

* This question thus left undecided by this court in *Lockerty v. Phillips* (*supra*) has been recognized by the courts to be one of pressing importance that should be answered. Cf. *United States v. Siegel*, 52 F. Supp. 238, *Brown v. W. T. Grant*, unreported, United States District Court, S. D. of N. Y., Dec. 14, 1943.

Article III, Section 2, Clause 1, provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States"

Thus, by constitutional grant, there was created a separation of powers vesting in the judiciary an immunity from legislative control of all inherent and essential elements of judicial power.

United States v. Klein, 13 Wall. 128 (1871);

Michaelson v. United States, 266 U. S. 42 (1924).

This concept of the independence of the courts was well stated by then Professor Felix Frankfurter and James M. Landis, in an article in the *Harvard Law Review* (Vol. 37; at p. 1026), (1924), in the following language:

"They (the courts) are an independent organ of government with finality of judgment within their domain, and not advisory adjuncts of the executive or the legislature."

This conclusion flows indisputably from a long line of well settled authorities.

In *United States v. Klein*, 13 Wall. 128 (1871), there was before the court for consideration the Act of Congress which provided in substance that where in the trial of a case before the Court of Claims it was proved and established that the claimant had taken part in an act of rebellion or disloyalty, "the jurisdiction of the court shall cease" and the suit was to be dismissed. The effect of the Act is stated at greater length as follows (at p. 143):

"* * * that no pardon, acceptance, oath, or other act performed in pursuance, or as a condition, of pardon, shall be admissible in evidence in support of any claim against the United States in the court of claims, or to establish the right of any claimant to bring suit in that

court; nor, if already put in evidence, shall be used or considered on behalf of the claimant, by said court, or by the appellate court on appeal. Proof of loyalty is required to be made according to the provisions of certain statutes, irrespective of the effect of any executive proclamation, pardon, or amnesty or act of oblivion; and when judgment has been already rendered on other proof of loyalty, the Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction. It is further provided that, whenever any pardon granted to any suitor in the court of claims, for the proceeds of captured and abandoned property, shall recite in substance that the person pardoned took part in the late Rebellion, or was guilty of any act of rebellion or disloyalty, and shall have been accepted in writing without express disclaimer and protestation against the fact so recited, such pardon or acceptance shall be taken as conclusive evidence in the court of claims, and on appeal, that the claimant did give aid to the Rebellion; and on proof of such pardon or acceptance, which proof may be made summarily on motion or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed."

In holding this Act unconstitutional as an attempt by the Legislature to infringe upon the judicial power, Chief Justice Chase said (13 Wall. 146):

"It is evident from this statement that the denial of jurisdiction to this court, as well as to the court of claims, is founded solely on the application of a rule of decision, in causes pending prescribed by Congress. *The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.*

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

"We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power."

It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, "The Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the court of claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because, and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself." (Italics ours.)

That case compels analogy to the case at bar, for here, too, the Government contends the District Court "has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists"; (to-wit, that a defense has been interposed of unconstitutionality of a regulation); "its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction."

To follow this contention to its logical conclusion is to hold "that Congress has inadvertently passed the limit which separates the legislature from the judicial power."

To the same effect is the case of *Ex Parte N. K. Fairbank Co.*, 194 Fed. 978, where the Court said (at p. 995):

"When Congress creates an inferior court and distributes to it jurisdiction over such subject-matters falling within the judicial power as Congress sees

proper to confer, the particular court eo instanti is armed, by virtue of the Constitution itself, with all the power essential to preserve its independence, to prevent the usurpation of its powers by other departments, and to enable the court to exercise the judicial power thus conferred as to every matter involving a judicial determination in any case before it. While Congress may regulate the methods of practice and procedure in the court in many respects, it cannot exercise this power of regulation so as to take from the courts, under the guise of regulating its procedure, the right to exercise judicial power as to any matter arising in the case whose disposition properly calls for the exercise of judicial power."

In the case of *Kuhnert v. United States*, 36 F. Supp. 798; aff'd 127 F. (2) 824, the Court said, in reference to an Act conferring jurisdiction upon the Federal District Court to render judgment against the United States for damage to land of named persons resulting from construction of dikes (at p. 800):

"The United States District Court is one of the constitutional courts. Within the constitutional limits, the jurisdiction of district courts is determined by Congress,—in what geographical area they shall function, with respect to what classes of cases they shall exercise judicial power. But the judicial power is conferred upon the district courts not by Congress, but by the Constitution. To determine what is the law applicable to a case, to apply that law to the case, to render judgment accordingly, these things are of the very essence of the judicial power. It is not conceivable that Congress ever would say to the constitutional courts (such legislative courts as the Court of Claims may be in a different situation): 'Congress has decided what rule of law will govern the decision of this case; the court will pronounce judgment accordingly.'

To illustrate, let us assume the case of A. v. United States, a war risk insurance case. The prime questions in the case are: Was A regularly enlisted; did he apply for war risk insurance; was he totally and

permanently disabled on January 1, 1925? These are questions to be decided upon the law and the evidence under and by the judicial power. Congress would not usurp the judicial power by specially legislating as to that particular case that the district court should find as a fact that A was an enlisted man, although the evidence might be to the contrary, or that in that case the rule against hearsay evidence should not be enforced or that the district court should not apply the law applicable to the actual contract but should apply the law applicable to an entirely different character of contract. Congress would not so legislate and no judge, having respect for the judicial oath, would obey such legislation if enacted." (Italics ours.)

Yet, the contention pressed for by the Government would clothe with validity the purported mandate of Congress in the Emergency Price Control Act of 1942 which the Court in *Kuhner v. United States (supra)* held to be without the confines of constitutionality. Since a regulation issued under an act becomes an integral part of that legislative scheme, courts charged with the enforcement of the regulation would quite, logically, therefore, be constrained to enforce a regulation whose terms may be clearly unconstitutional. This must perforce follow, notwithstanding the clear indications of the decisions that judges of a State Court (which is also charged with enforcement of regulations under the Act) may not enforce a statute whose terms are clearly unconstitutional.

Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60;
People v. Western Union Tel. Co., 70 Colo. 90,
 198 P. 146, 15 A. L. R. 326;
Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U. S. 74 (1930).

In the Matter of *Ex Parte Bakelite Corporation*, 279 U. S. 438, 49 S. C. 411 (1929), the District Courts are described as constitutional courts, not statutory. When once

created by statute, they exist under the Constitution, and their jurisdiction to decide controversies brought before them cannot be whittled down. These inherent powers attach to the District Courts, so that in the matters before them they have plenary powers to decide and enforce their decision.

To this effect see: *Farrell v. Waterman Steamship Co.*, 291 Fed. 604.

It is not disputed that a District Court may be deprived by Congress of jurisdiction to entertain a controversy, but in the light of the authorities heretofore referred to, it is respectfully submitted that no equal right exists enabling the Legislature to say that once the controversy is properly before the Court, that its power to decide the controversy under all its inherent powers may be nullified or limited.

If the rule of law were otherwise, a retailer affected would be compelled to obey every regulation no matter how arbitrary, capricious, oppressive and unconstitutional it may be on its face, in order to avoid a prosecution in which he has been stripped in advance of all rights to contest the validity of the regulation.

This limitation on the power of Congress has been very adequately expressed by Mr. Justice Rutledge in his concurring opinion in *Schneiderman v. U. S.*, 320 U. S. 118, 63 S. Ct. 1333, where he stated at page 168:

"Congress has, with limited exceptions plenary power over the jurisdiction of the federal courts. But to confer the jurisdiction and at the same time nullify entirely the effects of its exercise are not matters heretofore thought, when squarely faced, within its authority". (Italics ours.)

The same principle is also well stated in *Michaelson v. United States*, 291 Fed. Rep. 940 (at p. 946):

"Viewing the inferior courts, and also the Supreme Court as an appellate tribunal, we see that Congress, the agency to exercise the legislative power of the

United States, can, as a potter, shape the vessel of jurisdiction, the capacity to receive; but, the vessel having been made, the judicial power of the United States is poured into the vessel, large or small, not by Congress, but by the Constitution.

* * * *

"Congress may limit the jurisdiction of an inferior court to hearing criminal cases, or to designated kinds of criminal cases; but Congress cannot constitutionally deprive the parties in such a court of the right of trial by jury. The same is true of trials of 'cases in law.' And the jury in such a civil or criminal court must comprise 12 jurors and their verdict must be unanimous. Similarly Congress may limit the jurisdiction of an inferior court to hearing 'cases in equity', or to designated kinds of equity cases; but Congress cannot constitutionally deprive the parties in an equity court of the right of trial by the chancellor. *Martin v. Hunter's Lessees*, 1 Wheat. 331, 4 L. Ed. 97; *In re Atchison* (D. C.) 284 Fed. 604."

In that case there was involved the question whether Congress had the power to deprive a court of the right to punish for contempt. The Circuit Court of Appeals in the opinion, from which the above quotation has been taken, held that the right to punish for contempt is an inherent power of the court which Congress may not abrogate.

Upon appeal this Court (266 U. S. 42, 45 S. C. 18), affirmed the view taken by the Circuit Court of Appeals, but modified it to the extent that it held that a regulation of the manner of punishment for contempt was not an abrogation thereof.

The Court pointed out that notwithstanding the control of Congress over the inferior federal courts, *it cannot adopt a statute which will render inoperative the power of those courts to function*. In that case the Court said (at p. 66):

" * * * the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative."

To the same effect are those cases which hold that rules of evidence, that are contrary to normal inferences, cannot be forced upon the District Court in the decision of a case properly before it.

The latest of these authorities is:

Tot v. United States, 319 U. S. 463, 63 Sp. Ct. 1241,

where it was held that the provision in the Federal Firearms Act, that possession of a firearm by a person who has been convicted of a crime of violence or who is a fugitive shall be presumptive evidence that it was received in interstate commerce, is inconsistent with any argument drawn from experience and violates the due process clause of the Constitution.

Mr. Justice *Roberts* in his opinion stated as follows (pp. 1244-1245):

"The rules of evidence, however, are established not alone by the courts but by the Legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States. The section under consideration is such legislation. *But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act transgresses those limits.*

"This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the Legislature to create it as a rule governing the procedure of courts."

When once the Government institutes prosecution, whether civil or criminal, and thereby invokes the inherent powers of the District Court, those powers cannot in large measure be clipped off, so that the defendant is deprived of its weapons of defense. The court below, in the full exercise of its inherent powers, was clothed with constitutional protection from any interference in its right to decide all matters before it open* for decision.

In the language of this Court in *Hopkins v. Southern Cal. Telephone Co.*, 275 U. S. 393, 48 S. C. Rep. 180 (at p. 399) :

"As it acquired jurisdiction, all material questions were open for decision. *Greene, Auditor v. Louisville, etc., Co.*, 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88."

To the same effect see *Greene v. Louisville & Interurban R. Co.*, 244 U. S. 499, 37 S. C. Rep. 673, where the Court stated (at p. 677) :

"This being so, the jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the Federal question, or whether it be found necessary to decide it at all. *Siler v. Louisville & N. R. Co.*, 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451; *Ohio Tax Cases*, 232 U. S. 576, 586, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372."

Convincing proof that the Act not only has theoretically usurped powers rightfully belonging to the judiciary, but has actually resulted in many instances of such infringement, and has resulted in an administrative body which has arrogated to itself unlawful powers, is contained in the Report of the Congressional Select Committee to Investigate Executive Agencies—House Report No. 862, 78th Congress; 1st Session (November 15, 1943).

On page 6 of said Report, the following is stated:

"Nevertheless your committee has found, and proposes to show, that the Office of Price Administration has not remained within the bounds of its statutory powers. It has misinterpreted the language of the act so as to arrogate unto itself additional powers nowhere granted it by law and has administered the Act in such fashion as to cause many unnecessary hardships to our citizens."

To the same effect it is stated on pages 2 and 3 of said Report as follows:

"The committee finds that the Office of Price Administration has assumed unauthorized powers to legislate by regulation and has, by misinterpretation of acts of Congress, set up a Nation-wide system of judicial tribunals through which this executive agency judges the actions of American citizens relative to its own regulations and orders and imposes drastic and unconstitutional penalties upon those citizens, depriving them in certain instances of vital rights and liberties without due process of law.

* * * * *

"In addition to the statutory court created by the Emergency Price Control Act, your committee has found that the Office of Price Administration has developed an unauthorized and illegal judicial system and that through the mass of rules and regulations daily enacted by that agency it has also developed such intricate and involved administrative review machinery that litigants are completely bewildered by the maze of procedure through which they must wander to eventually arrive at a court which will grant them only the crumbs of judicial relief."

These conclusions have even been confirmed by the Judiciary, as shown by the following footnote to page 5 of the Report:

"In the case of *Clarence McDugle et al. v. Alex Elson, regional counsel, Office of Price Administration et al.*, decided before a three-judge Federal court in

the northern division of the southern district of Illinois, September 9, 1943, Judge Briggle stated in an oral opinion that 'this is the culmination of a series, a long series, of legislative acts which tend to deprive the courts of our country of jurisdiction of many questions and many, many problems, and has vested in various boards and various agencies the decision of public questions that normally and rightfully, in my judgment, belong to the courts.' The remarks of Judge Briggle were taken in shorthand at the time they were spoken, later transcribed and a copy of his remarks is now in the files of your committee."

POINT II

Since the administrative remedies provided for by the Emergency Price Control Act of 1942 do not afford adequate protection to parties affected thereby and do not provide for adequate judicial review, Section 204 (d) of the Act, as construed and applied by the Administrator, would deprive defendants in enforcement proceedings under the Act of property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

The appellant contended below that the provisions in the Act for protest and appeal affords due process.

Judge Deaver held that no protection or adequate judicial review was accorded under the Act and that the construction of Section 204 (d), as urged by the Government, would deprive defendants in enforcement proceedings under the Act of due process in violation of the Constitution.

The opinion of the court below states (R. 36) :

"People know that they are charged with knowledge of the law but, without actually knowing the law, they have been accustomed to make defenses only when the law is sought to be enforced against them. An act which permits an administrator to fix prices without

notice or hearing and then makes those prices conclusive after 60 days would, in practical operation, have the effect of cutting off defenses. That is especially true where the procedure provided makes it too inconvenient and expensive for individuals in small cases to follow the procedure."

(R. 37)

"Then, when the regulation is sought to be enforced against a defendant and he is forced into a local court, he finds that he cannot attack the validity of the act or the regulation and that, if 60 days have elapsed, he cannot question whether the regulation is fair and equitable because it has become conclusive without notice or opportunity to be heard, except such notice as he is charged with by a law which, in effect, says that, though no proceeding has been instituted against him, he must protest in advance and appeal to a distant court or be concluded."

We respectfully submit that administrative remedies must provide adequate protection during the time of the consideration of the matter before the administrative tribunals, and where such protection is not afforded to the persons affected, as to those persons the statute is unconstitutional.

Thus, in examining the constitutionality of withdrawal of a limited amount of jurisdiction from the District Court to enjoin certain activities under the Labor Relations Act, this Court, in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938) first examined the Act as to whether adequate protection was afforded thereby. The Court stated (at p. 48):

"The grant of that exclusive power is constitutional because the act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board."

And concluded by saying (at p. 50):

"Since the procedure before the Board is appropriate and the judicial review so provided is *adequate*, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals." (Italics ours.)

It must be observed that the court stressed the fundamental requirement of adequate protection. No such adequate protection is afforded by the act in question.

It was likewise held that statutes which deny an injunction to a public utility pending review of the fairness of a rate order are unconstitutional under the due process clause.

Mt. States Power Co. v. P. S. Commission of Montana, 299 U. S. 167 (1936);

Pacific Tel. Co. v. Kuykendall, 265 U. S. 196 (1924).

It has likewise been held that the principle of exhaustion of remedies has no application where no adequate protection is afforded to the parties questioning the regulation while an administrative remedy is sought. This is the case where an act establishes such unusually heavy penalties as to preclude judicial determination.

Ex Parte Young, 209 U. S. 123, 28 Sup. C. Rep. 441 (1908);

Natural Gas Pipeline Co. of America v. Slattery, 302 U. S. 300; 58 S. C. 199 (1937).

In the latter case, the Court stated as follows (at p. 310):

"As the act imposes penalties of from \$500 to \$2,000 a day for failure to comply with the order, any application of the statute subjecting appellant to the risk of the cumulative penalties pending an attempt to test the validity of the order in the courts and for a reasonable time after decision, would be a denial of due process."

A like situation exists with respect to all persons whose business is affected by regulations issued by the Price Administrator under the Emergency Price Control Act of 1942. No bond is required of the Government while the validity of the regulation is being considered by the Price Administrator, the Emergency Court of Appeals, and the United States Supreme Court. During that time, months may elapse during which business and trade are virtually confiscated.

Moreover, the Emergency Court of Appeals, which the Government claims has exclusive jurisdiction to pass upon the validity of regulations or orders, in all events is not really a court, except in name, and can only be considered part of the administrative process established by the court. This must be clear from a study of the powers of that court. The Emergency Court of Appeals (a) has no power to enjoin the enforcement of the Act; (b) is denied the power to issue any temporary restraining order enjoining the effectiveness of any regulation or order promulgated under the Act; and (c) any judgment of the court holding any regulation or order invalid is inoperative for a period of thirty days.

The Government has conceded that the necessity for adequate protection of the merchant or landlord is a prime requisite for the constitutionality of the Emergency Price Control Act. In *9 Law and Contemporary Problems*, at page 76, it is stated with great assurance on the part of one of the counsel for the Government as follows:

"There is here no attempt to preclude a judicial determination by establishing unusually heavy penalties." On the contrary, the path has been cleared for a speedy and complete judicial review without any of the risks of disobedience. The exclusive jurisdiction provisions require only that this path be followed. Whether or not such provisions would be appropriate in a peace-time price control measure, with no real threat of inflation impending, is now an academic question. There is no doubt that the exclusive juris-

diction provisions are both appropriate and essential to the effective operation of the Emergency Price Control Act."

"Cf. *Ex parte Young*, 209 U. S. 123 (1908).

The inadequacy of the Act to protect citizens in their constitutional and legal rights has been unanimously attested to in the report of the Select Committee to investigate Executive Agencies, House Report No. 699, 78th Congress, 1st Session, wherein that fact finding body, after investigating complaints against the Rent Department of the Office of Price Administration, found as follows:

"The most profound interest of this committee lies in the protection of citizens in their constitutional and legal rights. Despite the machinery which has been set up by the O. P. A., for appeals from its regulations and rulings, and the filing of petitions for changes in such rulings and regulations, there appear to be instances where for considerable periods of time access to the Emergency Court of Appeals has been, in effect, denied to protestants, due to the slowness with which O. P. A. officials have acted upon complaints."

A very clear example as to what must await the merchant who, under the other purviews of the Act, would perchance test the validity of a regulation along the devious administrative routes outlined by the Act, appears in connection with another regulation issued under the Act, to-wit, Maximum Price Regulation No. 330 (referred to here as M. P. R. 330).

M. P. R. 330 was issued on February 18, 1943. Said Regulation is upon its face not one for price control but for sales limitation. Within sixty days thereafter, to-wit, on April 19, 1943, *Montgomery Ward & Co., Inc.*, filed its protest with the Secretary of the Office of Price Administration. This protest claimed that M. P. R. 330 was invalid because in excess of the statutory power of the

Price Administrator. On May 20, 1943, the Office of Price Administration issued an order denying the said protest. A complaint was thereafter duly filed on June 19, 1943, with the United States Emergency Court of Appeals, and on September 23, 1943, the matter came up for hearing before the United States Emergency Court of Appeals.

*While the decision from that Court was still pending, the Price Administrator commenced injunction proceedings to enjoin Montgomery Ward & Co., Inc., from alleged violation of M. P. R. 330; the very Regulation which is before the Emergency Court of Appeals on the protest and complaint of said Montgomery Ward & Co., Inc. The injunction proceeding has already been determined, and an injunction has issued against Montgomery Ward & Co., Inc., notwithstanding the fact that at that time no decision had been handed down by the Emergency Court of Appeals.**

The very thing which this Court in *Natural Gas Pipeline Co. of America v. Slattery* (*supra*), said was not within the realm of due process, had been forced upon Montgomery Ward & Co., Inc., under the Brice Administrator's construction of the Emergency Price Control Act, to-wit, that company is now suffering from the penalties and hardships of an injunction "pending an attempt to test the validity of the order in the courts and for a reasonable time after decision", and this situation is in the language of the same Court "a denial of due process".**

The denial to merchants in all cases affected by the Act and the Regulations issued thereunder of the right of a stay, pending completion of the lengthy administrative

* Case still unreported.

** That this is by no means an isolated instance, appears from the cases of *Safeway Stores, Inc. v. Brown*, Emergency Court of Appeals, 1 Price Control cases, Par. 50,989, cert. denied, Dec. 13, 1943, 12 LW 3198, and *Aberle, Inc. et al. v. Prentiss Brown*, Emergency Court of Appeals, Docket No. 97, undecided.

process just outlined, establishes the inapplicability of the doctrine of the exhaustion of administrative remedies.

In *Porter v. Investors Syndicate*, 286 U. S. 461 (1932), this Court, in an opinion by Mr. Justice *Roberts*, said (at pp. 470-471):

"Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440, 454. But where either the plain provisions of the statute (*Pacific Teleph. & Teleg. Co. v. Kuykendall*, 265 U. S. 196, 203, 204) or the decisions of the state courts interpreting the act (*Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290) preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing court, due process is not afforded, and in cases where the other requisites of federal jurisdiction exist recourse to a federal court of equity is justified."

See also:

Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290 (1923).

It is a fact that the Legislature in enacting Statutes providing for administrative regulation has in the past been cognizant of the requirement that provision be made for the stay of administrative orders that are likely to bring about harsh results if left outstanding pending judicial review thereof.

Provisions for that purpose appear in the (1) Securities Act of 1933, (2) Securities Act of 1934, (3) Public Utility Holding Company Act of 1935, (4) the Federal Power

Act, (5) the National Labor Relations Act, (6) the Natural Gas Act, (7) the Fair Labor Standards Act of 1938, (8) the National Bituminous Coal Commission Act, (9) the Agricultural Adjustment Act of 1938, (10) the Civil Aeronautics Act of 1938, and (11) the Federal Food, Drug and Cosmetics Act of 1938. (12) Under the Federal Alcohol Administration Act, the commencement of review proceedings operates as a stay unless the court orders to the contrary.

Judicial sanction has been given to stays pending review of administrative action, where irreparable loss and damages may result, in the following cases:

Uebersee Finanz-Korporation, etc. v. Rosen, 83 F. (2d) 225, 228;

Truax-Traer Coal Co. v. National Bituminous Coal Commission, 95 F. (2d) 218;

Saxton Coal Mining Co. v. National Bituminous Coal Commission, 96 F. (2d) 517.

In the last mentioned case, the United States Court of Appeals for the District of Columbia in its opinion stated as follows (at p. 517):

"* * * it further appears that the producing coal companies were parties to these orders and that they are interested parties, and that if the orders are invalid, they are suffering irreparable and continuing damage. Under these circumstances the denial of relief pendente lite, sought to prevent continuing irreparable damage and to preserve in so far as possible the status quo until a ruling upon final review, would be extraordinary unless the ultimate right of review sought is clearly without foundation."

Of particular interest with regard to these contentions is the 43rd Report of the Special Committee on Adminis-

trative Law of the American Bar Association, wherein the following is stated on page 3 thereof:

"If Congress has provided a statutory scheme for such review, he may find that too but an illusion. Take the Emergency Price Control Act of 1942. If the citizen were charged with an ordinary criminal offense, under the Bill of Rights he would 'enjoy the right to a speedy and public trial, by an impartial jury of the state and district.' But if charged with criminal violation of the Price Control Act, or prosecuted civilly, he may have the benefit of constitutional and statutory protections and defenses only in the Emergency Court of Appeals at Washington (Section 204 (d), Emergency Price Control Act.) Even then he must first have undertaken formal protest proceedings before the Price Control Administrator, which may consume three months (Section 203 (a)). Then he must take some time, say a month, to get the case into the Emergency Court staffed by specially assigned judges busy in their several circuits. *Meanwhile that court has no authority to grant him a stay of the price regulation (Section 204 (c)), something that Congress has never before withheld* (*Scripps-Howard Radio v. Comm'n.*, 316 U. S. 4, 17). Even should the court find for him, its judgment is suspended for at least a month, and for an indefinite time if the Government shall seek *certiorari* in the Supreme Court (Section 204 (b)). At the very least six months will have elapsed, after which the issues will long since have become moot or the Office of Price Administration may make some insufficient adjustment and so require the parties to start all over again. Not only is the statutory review illusory, but it effectively precludes recourse to non-statutory review which might otherwise be available. The consequent lack of any practical review leaves the statute merely advisory and the administrative arm supreme. And there is no reason to believe that this state of affairs has not harmed, rather than aided, the cause of price control." (Italics ours.)

It is respectfully submitted that the contentions contained under this Point are especially warranted in the light of the

following conclusion contained in the Report of the Select Committee To Investigate Executive Agencies, House Report No. 862, 78th Congr., 1st Session, wherein it is stated as follows (at p. 8):

"With the narrow limitations, both on the scope of review and the extent of relief which the court may grant, your committee submits that it will be very rare when the Court will be able to determine that any decision of the Administrator is 'arbitrary or capricious' and that therefore the scope of the judicial review provided as a safeguard in the act is so small as to be almost nonexistent." (Italics ours.)

In view of the unreasonable length of time that must elapse before administrative review is possible, no argument is required to show that during such proceedings, a merchant or landlord may suffer irreparable loss and damages. Under the cases discussed herein, the inadequacy of judicial review constitutes deprivation of property without due process of law, in violation of the Fifth Amendment to the Constitution.

POINT III

Since the Emergency Price Control Act of 1942 is not in itself a statute which by its terms regulates prices or rents, but is merely an authorization to the Price Administrator to so regulate, without providing for any standard, rule or method whereby such maximum prices or rents shall be established, it is an unlawful delegation by Congress of legislative powers in contravention of the provisions of Article I, Section 1, of the Constitution of the United States.

It is a fundamental constitutional principle that the power of the Congress to legislate is confined constitutionally to the Congress, and the delegation of such powers may validly be made only under carefully defined standards and rules.

As stated by this Court in:

Wichita R. & L. Co. v. Commission (1922), 260 U. S. 48, 43 S. Ct. 51,

(at p. 59) :

"In creating such an administrative agency, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."

The motive of Congress in effecting the delegation is not the basis for testing the constitutionality of the Act.

In: *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 Sup. Ct. Rep. 241 (1935), there came before this Court the validity of an Executive Order issued pursuant to a provision of the National Industrial Recovery Act of June, 1933, which authorized the President to prohibit transportation in interstate and foreign commerce of petroleum in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State, and further provided that any violation of any order of the President issued thereunder should be punishable by fine or imprisonment, or both. The President under an Executive Order prohibited the transportation in interstate and foreign commerce of petroleum in excess of the amount permitted by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Referring thereto, this Court, per Mr. Chief Justice *Hughes*, said as follows (at p. 420) :

"The question whether such a delegation of legislative power is permitted by the constitution is not answered by the argument that it should be assumed that the President has acted and will act for what he believes to be the public good. The point is not one of motives but of constitutional authority for which the best of motives is not a substitute."

In the same case, this Court in invalidating the Executive Order, based its decision upon the fact that in effecting its delegation of power (at p. 430) :

"* * * Congress has declared no policy, has established no standard, has laid down no rule, * * *."

This Court has thus expressly held that a policy and standards must be set up to give an act of Congress constitutionality. The Emergency Price Control Act of 1942 in its delegation of powers to the Price Administrator is as defective as was the act and order under consideration in *Panama Refining Co. v. Ryan (supra)*.

As stated in *Roach v. Johnson*, 48 F. Supp. 833, in discussing the Emergency Price Control Act of 1942 (at p. 834) :

"The order in this case, as in the *Panama* case, contains no finding of facts, no statement of the grounds of the Administrator's action. Again in the case at bar, as was held in the *Panama* case, if it could be inferred that Congress intended certain circumstances or conditions to govern the exercise of the authority conferred, the Administrator could not act validly without complying with the circumstances and conditions and findings by the Administrator that these conditions existed and were necessary, else it is left entirely to the unfettered discretion of the Administrator."

"No determinations of facts are shown in the case at bar. The only provision in the Emergency Price Control Act that even hints at the necessity for determination of fact is found in Section 202, 50 U. S. C. A. Appendix § 922 where it is provided that:

"The Administrator is authorized to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the Administration and enforcement of this Act and regulations, orders, and price schedules thereunder."

(At pp. 834, 835):

"As defendant very well says on page 16 of his brief,

"He (the Administrator) possesses here not only a figurative "roving commission", but one in patent literalness. He may move from state to state, from county to county; and according as "the spirit moves" or in the measure of his last nocturnal sojourn, whether restful or restless, his morning meal palatable or inedible, find or decline to find, as for that territorial locality where each morning sun discovered him, that it was "an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations which will bring about speculative, unwarranted and abnormal increases in rents which tend to defeat or obstruct the effective prosecution of the war". He (the Administrator) becomes the general agent of the Congress—first to choose the area for legislation, then to choose the character of the legislation that he believes suits the area selected for action, and there to enforce it in the manner he sees fit." (Italics ours.)

A judgment was entered in the above case based upon a finding of the invalidity of the Emergency Price Control Act.

The judgment was vacated by this Court (May 24, 1943); on the ground that the judgment had been obtained by collusion between the plaintiff (tenant) and the defendant (landlord), but no contrary opinion was expressed.

Schechter Corp. v. United States, 295 U. S. 495 (1935), involved the validity of Section 3 (a) of the National Industrial Recovery Act, authorizing the President to approve codes of fair competition "for trades and industries". The Statute provided that codes may be approved upon application of one or more trades or industrial groups, if the President found (1) that such associations impose no inequitable restrictions on membership, and are

representative, and (2) that the codes are not designed to promote, monopolize or to eliminate small industries or to discriminate against them. It further provided, that the President may as a condition of approval of any code, impose such conditions "for the protection of consumers, competitors, employees and others, and in furtherance of the public interests, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared."

In holding that such a sweeping delegation of legislative power found no support in the decisions of this Court, it said (295 U. S. 541):

"To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

As stated in the concurring language of Mr. Justice *Cardozo* (at p. 551):

"This court has held that delegation may be unlawful, though the act to be performed is definite and single, if the necessity, time, and occasion of performance have been left in the end to the discretion of the delegate."

Applying the principle of these cases to the present case, the conclusion is clear that the Emergency Price Control Act should be declared unconstitutional as an improper delegation by Congress of its legislative functions. By this Act Congress has conferred upon the Administrator not merely the power to fill up the details in the general scheme of the Act, or to exercise the administrative function of applying a general principle or standard, but complete and comprehensive authority to determine what the Act shall include, when it shall begin to operate, and when price schedules, regulations, or orders shall terminate.

The general purposes of the Act are stated in Section 1 (a) as follows:

"It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes."

In order to carry out the stated purposes of the Act, Congress has delegated to the Administrator in Sections 2 (a) and 2 (b) virtually complete discretion in the matter of fixing maximum prices and rents. Section 2 (a) provides:

"Whenever in the judgment of the Price Administrator *** the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. *** Before issuing any regulation or order *** the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. *** Whenever in the judgment of the

Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders, establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection."

Section 2 (b) provides:

"Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Admin-

istrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area."

Section 2 (e) provides:

"Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

By Section 2 (h) of the Act it is further provided that the powers granted by Section 2 shall not "be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry".

It will thus be seen that under the provisions of this Act the power to determine how, where and when rents shall be fixed or on what commodities price ceilings should be placed is wholly discretionary and not mandatory. Although Sections 2 (a) and 2 (b) use the word "shall"

when, dealing with the ascertainment and consideration of prices and rents prevailing on any date and for the making of adjustments, it, nevertheless, provides that in establishing any maximum price and rents the Administrator shall do so only so far as practicable. Whatever mandatory effect these words may have is completely emasculated by Section 2 (e) which, it should be observed, provides that any regulation may be established in such form and manner, contain such classifications and differentiations, and provide for such adjustments and exceptions as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of the Act. This latter provision, when considered with the words "so far as practicable", clearly shows that the Administrator is not compelled to follow any specified or certain standard but may fix any price or rent which he may choose without taking into consideration any of the elements specified in Sections 2 (a) and 2 (b). Thereby no mandatory standard is established by the Act.

Moreover, there is no requirement in the Act that the Administrator must fix a price ceiling on every commodity which rises or threatens to rise. He may fix ceilings on some commodities and leave others alone. He may, under the terms of the Act, even differentiate between commodities in the same class. Thus, he may fix a ceiling on the price of chickens but need not on ducks or geese. In addition, he may terminate any price schedule whenever he wishes and re-impose any kind of a ceiling whenever he chooses. He may himself determine, at will, what localities are areas "where defense activities have resulted or threatened to result in an increase in the rents for housing accommodations which bring about speculative, unwarranted and abnormal increases in rents which tend to defeat or obstruct the effective prosecution of the war." He may so change and reclassify the boundaries of such areas as to create an unforeseen administrative "gerry-

mandering" without limitation. This gives him such an unbounded discretion, in the words of Justice *Cardozo*, as to amount to "delegation running riot."

Thus, the Administrator has not only been given the power to determine what prices and rents should be fixed and where and what commodities should be covered by the price ceilings, but also the power to determine when a price ceiling shall begin and when it shall terminate and where rents shall be fixed and where they shall not. Congress has thereby failed to define the circumstances and conditions under which the Administrator should act and in the same manner Congress has failed to set up any standard sufficiently definite to guide him in his determination as to the period for which each price and rent ceiling should exist.

Nor is the Administrator obliged to depend upon any specified procedure for the determination of the circumstances and conditions under which the ceiling is to be imposed or discontinued. Even fixing of the price ceiling is left to the uncontrolled discretion of the Administrator. Although Section 2 provides that consideration should be given to the prices prevailing between October 1 and October 15, 1941, and the rents prevailing on or about April 1, 1941, and that he shall make adjustments for such relevant factors therein mentioned as he might determine and deem to be of general applicability, during and subsequent to the times mentioned, as we have already pointed out, he is not compelled to act upon such facts. All he is required to do is to consider them. So long as he considers them, he may disregard them completely. Again, this is not sufficient to provide a certain or definite standard for the setting of a rent or price ceiling.

Nor can it be reasonably argued that the exercise of the powers conferred by the Act is merely a ministerial func-

tion delegated to the Administrator. If he may set a ceiling or unmake it, if he may apply it to all or none of the commodities sold in this country or to all or none of rent areas in this country, if he may extend it to competing commodities or restrict it to enumerated commodities, if he may begin and end its application and determine its duration, if he may fix the extent of the ceiling; then and under such conditions the powers exercised by him cannot be said to be merely administrative but are, without question, discretionary. As such they clearly violate the constitutional prohibition against the delegation of powers for by their exercise it is the Administrator and not Congress who performs the legislative function. *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935); *Schechter Corp. v. United States*, 295 U. S. 495 (1935).

Thus under M. P. R. 330, Section 1389.562 (a), the Administrator undertakes to set out definitions to govern the regulations and in doing so, undertakes to subordinate the definitions contained in the Act itself, and to make the definitions contained in the Act applicable only where he has not otherwise specifically provided, for Section 1389.562 (a) provides:

"Unless the context otherwise requires or unless otherwise specifically provided herein, the definitions set forth in Section 302 of the Emergency Price Control Act of 1942, as Amended, and in § 1499.20 of the General Maximum Price Regulation, shall apply to the terms used in this regulation." (Italics ours.)

In other words, Section 302 of the Act, which has certain definitions, means nothing to the Administrator.

302 (i) of the Act defines maximum price as the maximum *lawful* price of a "commodity", which word is defined in Sec. 302 (e) of the Act, yet the Administrator subordinates this definition and says to merchants under

M. P. R. 330:

"You who were in business in March 1942 may not sell any merchandise above the highest price line carried by you during that month, notwithstanding that under the statement of considerations for Regulation 330 I have given your present competitors, who happened not to be in business in March 1942 the right to sell the same garment at the highest price charged by his most closely competitive seller, without reference to the March 1942 highest price line."

Assuming therefore (and it happens to be the fact) that a merchant was selling coats in March 1942 and the highest priced coat sold by him during that month was \$14.89. This merchant has a coat of better quality which he can sell for \$16.89, the Administrator forbids him to do so, notwithstanding the fact that that same coat is being sold by a competitor for \$19.98. Thus the Administrator has one maximum lawful price for the merchant in business in March 1942 who operated at low cost and low markup, and a much higher maximum lawful price for the merchant who operated at high cost with high markup in 1942, and a high maximum lawful price for the man who was not in business in March, 1942, all of whom sell the identical article. That illustrates the construction by the Administration of Section 302 (i) and Section 302 (e) of the Act, and shows that the Administrator is absolutely indifferent to the meaning of maximum lawful price as set out in the Act. In other words, as he states in 1389.562 (a) the statutory definitions have no worth or value when they conflict with the definition that the Administrator wishes to give to his Regulations.

It is submitted under this point that the Emergency Price Control Act of 1942 as amended by the Inflation Control Act of 1942 is unconstitutional in that it illegally delegates legislative powers to the Administrator.

POINT IV

The contentions and authorities relied upon by the Government are not controlling.

The government has urged throughout, that the Act and regulations in question consist of a well exercised use by Congress of its war powers.

The answer to that contention was cogently framed by Judge Deaver in the opinion of the court below, where he stated (R. 31):

“To urge that Article 1, Section 8, of the Constitution settles the matter is to miss the question. That Article grants powers but it does not authorize Congress to delegate those powers.”

The existence of war does not permit the extension beyond constitutional confines of the powers of our governmental departments nor does it permit infringement of the constitutional liberties of our citizens.

Mr. Justice Murphy, in his concurring opinion in *Hirabayashi v. U. S.*, 329 U. S. 81, 63-S. C. 1375, has well said (p. 113):

“While this Court sits, it has the inescapable duty of seeing that the mandates of the Constitution are obeyed. That duty exists in time of war as well as in time of peace and in its performance we must not forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men.”

The cases that may be relied upon by the Government, to the effect that Congress may limit or withhold jurisdiction from inferior courts, are quite beside the point. There is no dispute of the right of Congress to do so.

If Congress had stated in the Emergency Price Control Act that only the Emergency Court of Appeals had jurisdiction to hear and determine every question involving the Emergency Price Control Act, including enforcement thereof, except the Supreme Court upon review, then there could be no question but that jurisdiction with regard to the Act had properly been withheld from the Court.

But this Congress did not do. Instead the Act states that District Courts and State Courts shall have jurisdiction in enforcement suits, and that, of course, means to hear and *determine* enforcement suits. But these courts, thus clothed with jurisdiction, find their inherent powers suddenly stripped at a point where the defendant interposes defenses and proffers evidence on the question of the invalidity of the regulation which is the very basis for the enforcement suit. *Therein lies an excess of power not sanctioned by the Constitution of the United States.*

This Court in *Lockerty v. Phillips*, 319 U. S. 182, 63 S. Ct. 1019, while it expressed the undisputed principle that Congress has plenary power over the jurisdiction of the federal courts, did not hold that jurisdiction, once conferred, could at the same time be nullified or limited. On the contrary, Mr. Justice Rutledge in his concurring opinion in *Schneiderman v. U. S.*, 320 U. S. 118, 63 S. Ct. 1333, at page 168, did hold that it was not within the authority of Congress to confer jurisdiction upon federal courts and at the same time nullify the effect of the exercise thereof by such courts.

The Government may rely upon the following cases:

Texas & Pac. Ry Co. v. Abilene Cotton Co., 204 U. S. 426; 27 S. C. 350 (1907);
Lehigh Valley RR. Co. v. U. S., 188 F. Rep. 879;
U. S. v. Vacuum Oil Co., 158 F. Rep. 536.

These cases are all distinguishable. They involve suits in which a schedule of rates was established by the Interstate Commerce Commission, the Court holding that the shipper or the railroad company could not raise the question of the invalidity of the rates without having exhausted the administrative remedy. But in those cases the persons affected by the rates had an adequate remedy if the rates were confiscatory after having exhausted the administrative remedy and having been denied the same, since where the courts held the rates confiscatory, they were in a position to recover the excess paid. No such situation exists in the case before this Court. On the contrary, injunctions may be obtained against business-men, as in the case of *Montgomery Ward & Co.* (p. 21 of this brief), and no bond need be given by the Price Administrator. So that if upon review the Court should vacate the injunction, the merchant has suffered loss of months of time and consequent loss of money, if not his entire business, without hope of compensation.

In the twelve statutes referred to on pages 23 and 24 of this brief, provision is contained for stays pending review of administrative action, where irreparable loss and damages may result. No such right is given under the Act in question.

Reliance may also be placed by the Government upon *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, wherein the doctrine of the exhaustion of administrative remedy was approved. However, as already pointed out, the decision in that case is founded upon the provisions in the Act granting (at p. 48) "adequate opportunity to secure judicial protection against possible illegal action on the part of the board."

It is also worthy of note that the opposition to the issuance of the injunction therein was wholly placed upon the grounds that litigation would result in an expense and annoyance, the exact language being as follows:

"* * * that hearings would, at best, be futile; and that the holding of them would result in irreparable

damage to the corporation, not only by reason of their direct cost and the loss of time of its officials and employees, but also because the hearings would cause serious impairment of the good will and harmonious relations existing between the corporation and its employees, and thus seriously impair the efficiency of its operations."

The decision of this Court in that case in effect held "that the expense and annoyance of litigation is 'part of the social burden of living under government'."

(*Petroleum Exploration v. Public Service Com'n*, 304 U. S. 200, 222; 58 S. C. 834, 841.)

The situation in the case at bar is radically different.

Here it cannot be said that the administrative remedy is practical and offers due process where it is too inconvenient and expensive for individuals in small cases to follow the procedure. The Act thus permits an Administrator to fix rents without notice or hearing and then makes those rents conclusive after sixty days, and in practical effect, cuts off all means of protest and defense on the part of the many small landlords who comprise the bulk who operate housing facilities.

Perhaps all that was said in defense of the Government's position as to the question of delegation of powers was stated in the brief submitted by General Counsel to the Office of Price Administration in the hearings before the Senate Committee on Banking and Currency.

On page 229 of the Committee Report (Dec. 1941), counsel holds that the standards in the Act are fully definite and as proof thereof states the following (at p. 229):

"Not only must the maximum prices established be fair and equitable and in accord with the purposes of the act but they also must be established, so far as practicable, with due consideration for prices pre-

vailing during a specified period of time before the legislation became effective."

This standard approved by the Government as being fully definite must give pause to men in free governments. For here the standard is not what Congress thinks would be fair and equitable under designated facts, but what the Administrator in his uncontrolled discretion thinks would be fair and equitable. The Administrator thus becomes the general agent of Congress, first to decide upon where and when maximum rents must be established, then to decide himself as to what is fair and equitable and what is practicable, and then to choose the character of the regulation to put his thoughts into force, and next to enforce it in any manner he sees fit.

In the language of Mr. Justice Cardozo in *Schechter v. United States*, 295 U. S. 495, 551:

"The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, * * *"

It "is delegation running riot" (at p. 553).

CONCLUSION

The judgment of the Lower Court should be affirmed.

Respectfully submitted,

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OTTO C. SOMMERICH,
Amici Curiae.

MAXWELL C. KATZ,
OTTO C. SOMMERICH,
BENJAMIN BUSCH,
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1943.
No. 461

PRENTISS M. BROWN, AS ADMINISTRATOR OF THE OFFICE OF
PRICE ADMINISTRATION, *Appellant,*

p8.

MRS. KATE C. WILLINGHAM AND J. R. HICKS, JR.,

Respondents.

PETITION TO FILE BRIEF AMICI CURIAE

and

BRIEF AMICI CURIAE

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1943
No. 464

PRENTISS M. BROWN, AS ADMINISTRATOR OF THE OFFICE OF
PRICE ADMINISTRATION, *Appellant,*

v.s.

MRS. KATE C. WILLINGHAM AND J. R. HICKS, JR.,
Respondents.

PETITION TO FILE BRIEF AMICI CURIAE

The undersigned ask for permission to file the following brief *amici curiae*:

The issues, among others, involved in the present case are whether the rent provisions of the Emergency Price Control Act of 1942 are invalid on the grounds of improper delegation of legislative power, and are violations of due process.

The undersigned appear as the attorneys of record, representing the defendants in the following cases, now pending in the courts hereinafter mentioned, wherein the identical questions involved in this case are presented for determination, to-wit:

Chester Bowles, as Administrator of the Office of Price Administration, vs. Warner Holding Company, a Corporation, now pending in the United States District Court, District of Minnesota, Fourth Division, bearing File No. Civil 884, which is an action brought for an injunction restraining defendant from violation of the provisions of said Act;

the following cases pending in the Municipal Court of the City of Minneapolis, Minnesota, which are actions brought by tenants for the purpose of recovery of treble damages,

attorney's fees and costs, under Sec. 205 (e) of said Act, to-wit:

Ira A. Desper vs. Warner Holding Company, a Corporation, No. 392556;

Charles M. Lamar vs. Warner Holding Company, a Corporation, No. 392555;

M. E. Grochau vs. Warner Holding Company, a Corporation, No. 392554;

Walter C. Koepke vs. Warner Holding Company, a Corporation, No. 393834;

Thomas E. Regnier vs. Warner Holding Company, a Corporation, No. 393835;

Irving Russoff vs. Stephen Tuhy, No. 389081.

Due to the fact that the Solicitor General of the United States has selected this case as the test case, no opportunity will be afforded the undersigned to present their views in connection with the determination of the issues involved.

The amount of claimed treble damages in said Municipal Court cases and the rights involved in the case pending in the United States District Court for the District of Minnesota, Fourth Division, wherein the undersigned are attorneys of record, are considerable and substantial and the undersigned therefore request that the Court permit them to file the following brief as *amici curiae* in the above-entitled action.

The attorneys for appellant and respondents have consented in writing to the filing of a brief by the undersigned.

Dated at Minneapolis, Minnesota, this 22nd day of December, 1943..

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Amici Curiae.

IN THE
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PRENTISS M. BROWN, AS ADMINISTRATOR OF THE OFFICE OF
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v.s.
MRS. KATE C. WILLINGHAM AND J. R. HICKS, JR.,
Respondents.

BRIEF AMICI CURIAE

SUMMARY OF ARGUMENT

1. The Emergency Price Control Act of 1942 constitutes an unlawful delegation of power by the Congress to the administrator therein provided for without setting forth adequate standards to limit his discretion and guide him in the administration of the Act.
2. The Act fails to provide for notice and opportunity to be heard before regulations and orders, which the administrator is authorized to promulgate, become effective.
3. The Congress has failed to adopt reasonable means to attain a conceded legitimate end in the control of rents. The means adopted by the Congress are not appropriate, plainly adapted to the end, and are prohibited by and are inconsistent with the letter and spirit of the Constitution in that the said means so adopted are not required by and have no relation to the legislative policy set forth in the

purpose clause of the Act.

4. Contrary to the constitutional requirements, the Act leaves it to the discretion of the administrator to act or not act, even though the statutory standard of the action may be found to exist.

5. The remedy provided for in the Act made available to the landlord upon his claim that any regulation or order promulgated by the administrator is contrary to law, arbitrary or capricious, is so wholly inadequate as to amount to a failure to afford due process of law.

6. Sec. 204 (d) of the Act did not preclude the lower court from exercising jurisdiction to determine whether or not the Act was constitutional, notwithstanding the provisions of Sec. 265 of the Judicial Code (Title 28, U. S. C. A., Sec. 379), and this Court has jurisdiction to review the decision of the lower court in pursuance of the provisions of the Act of August 24, 1937 (Title 28, U. S. C. A., Sec. 349 (a)).

INTRODUCTION

The writers of this brief have not had before them the brief filed by the appellant. It is the purpose of the writers, therefore, to discuss the principles upon which it is insisted that the provisions of the Emergency Price Control Act of 1942 are unconstitutional without reference to the briefs of interested parties.

It is proposed to treat the subject, not from a standpoint of lack of power in the Congress to regulate and control rent under the war power clause (Art. I, Sec. 8, in Constitution), but to attack the manner and means employed in attempting so to do. It is conceded that the Congress has power to regulate rent or act in any other manner having

to do with the requirements for national preservation. It is its duty to act in such connection. As a corollary it will be urged that while rank and file of the citizenry will voluntarily sacrifice and loyally submit to any such control and regulation in war times there is no basis or authority for the Congress to deprive them of, or to require that they give up *justice* and the right to obtain it.

The attempt on the part of Congress to control rents is concededly a war measure, but it is plain that the manner in which the Congress has attempted to do this is neither prompted nor made necessary by the emergencies brought about by the present war. The means adopted by the Congress bear no relation whatever to the emergencies which the Congress has endeavored to meet.

Having in mind that this legislation may be but a step toward the further encroachment upon the rights of the citizen and that, in the early ages of judicial history of this country, this Court has admonished us to always "withstand beginnings," we feel a justification in asking permission to file this brief.

JURISDICTION.

No question is raised with respect to the jurisdiction of this Court to hear and determine the issues involved in this case. Such jurisdiction is conferred by Sec. 2 of the Act of August 24, 1937, c. 754, 50 Stat. 752, 28 U. S. C. A. 349 (a).

ARGUMENT AND AUTHORITIES

A.

The Statutory Standards Provided for in the Act Are Insufficiently Defined, Fail to Satisfy the Requirements of Due Process of Law, and Constitute an Unlawful Delegation of Power to the Administrator.

(1) Review of Provisions of the Act.

On the morning of December 7, 1941, this country faced an emergency more ominous than that which confronted it at 4:30 o'clock in April in 1861, when Ft. Sumter was fired upon. During the days that followed "Pearl Harbor," the entire country was startled suddenly from its lethargy. It did many things impulsively. Congress, activated by that momentum, passed legislation which, in normal time, would have received far more deliberation and circumspection.

Thus, fifty-four days after "Pearl Harbor," the Emergency Price Control Act of 1942 was hurriedly passed, approved, and became a law.

Not only did the Act repose enforcement in an administrator in keeping with the all too popular trend of the times, but it clothed that administrator with a power and discretion to act without the time-honored safeguard of a formula of action and without limitations thereon through clearly announced standards.

The extent to which the Act empowers the administrator to act is limited only by that which is termed *his judgment*. This necessarily precludes the courts and other reviewing bodies from a control of his activities. He is given a right to act without even conducting a hearing. Such power removes the last barrier against arbitrary action which in turn invites disposition.

The following pertinent provisions of the Act, with the

supplied italicizing, will serve to emphasize the foregoing observation and clarify our later argument.

Sec. 302 (d) attempts to define what is termed "defense-rental area." The definition falls far short of a determination by the Congress of what is "necessary and proper" under its constitutional grant of power. It provides:

" 'Defense-rental area' means the District of Columbia and *any area designated by the Administrator* as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the provisions of this Act."

The purposes of the Act or the Congressional declaration of policy is incorporated in Sec. 1 (a), where it is stated:

"It is hereby declared to be in the interest of national defense and security and necessary to the effective prosecution of the present war, and the purposes of this act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increase in prices and rents * * * to eliminate and prevent profiteering * * * and other disruptive practice resulting from abnormal market conditions or scarcities caused or contributing to the national emergency; * * * to protect persons with relatively fixed and limited incomes * * * wage earners * * * from undue impairment of their standard of living * * *"

These purposes are well within the ambit and scope of those entitled to consideration by the Congress in promoting the war effort. However, generalities of these expressions and the undefined words used, coupled with the judgment and discretion lodged in the administrator to follow and interpret them make those generalities the subject of serious consideration from the viewpoint of constitutionality of the Act.

The Act then provides (Sec. 2 (b) and (c)):

"(b) Whenever in the judgment of the Administrator such action is necessary or proper in order to ef-

fectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not *in the judgment of the Administrator* been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator *may by regulation or order establish such maximum rent or maximum rents* for such accommodations *as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act.* *So far as practicable*, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which *in the judgment of the Administrator*, does not reflect such increases), and he shall make adjustments for such relevant factors as *he may determine and deem to be of general applicability* in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator *shall, to such extent as he determines to be practicable*, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area.

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as

in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

Sec. 2 (d) provides that the administrator may promulgate regulations and orders to prevent speculation and manipulation and orders relating to recovery of possession of real property whenever in his "judgment" it is necessary so to do to effectuate the general purposes of the Act.

The administrator may make studies and investigations, as *he deems necessary or proper* (Sec. 202 (a)), before promulgating his regulations and orders. After he studies and investigates he may make his orders and regulations without restrictions excepting what *he deems necessary and proper*.

He may require any person to furnish information and keep such records as *he deems necessary* (Sec. 202 (b)) without confining his inquiry to owners of housing accommodations within the defense-rental area.

He may subpoena and require any person to appear before him and produce documents (Sec. 202 (c)).

In establishing his defense-rental area, he may, but is not required to, take official notice of economic data and other facts (Sec. 203 (a)).

Throughout the Act authority is repeatedly given to the administrator to act when *in his judgment* action would be *determined by him to be necessary* to effectuate the purposes of the Act.

(2) The Congress Must Determine What is Necessary and Proper.

Art. I, Sec. 8 (Clause 18) of the Constitution definitely sets out a granted power to the Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers" Within the limits prescribed by the quoted provision of the Constitution the Congress has the power to do anything that may be necessary to the effective prosecution of the present war, but the Constitution plainly points out that such shall be done only by the Congress. The Congress and the Congress alone, is the representative of the people. While it is circumscribed with certain prohibitions in the exercise of its powers in peace time, these prohibitions are sufficiently elastic to permit the expansion of those powers to encompass practically everything that may be necessary to be done to meet the war emergency and preserve the nation intact, provided that it is *the Congress* that does them.

The procedural steps of the enactment of a law by the Congress is sufficient to guarantee to the people it represents that when the Congress has definitely fixed upon the terms of an act it will have done so after every reasonable means has been afforded the people's representatives to inform themselves personally and the Congress collectively of the merits and demerits that attend any proposed bill. These procedural steps themselves guarantee against arbitrary and capricious action through publicity and frank discussions. Consequently, while the measure of guarantee will always be the same whether in peace time or in war, the Acts of Congress may not always be the restricted acts in times of war that may be taken in times of peace. The major consideration, however, is that the measure of protection is lodged in the procedural steps which the Congress is re-

quired to take before the enactment of a law *by it.*

The Constitution does not permit the Congress to provide in the laws it enacts that a designated administrator or some bureau or commission shall have the power "to make all laws which shall be necessary and proper," nor to determine what those laws shall be. If the framers of the Constitution had intended Congress to have such power it would have been granted to the Congress. The Constitution makes the determination of what laws shall be a necessary Congressional act and not an act of some individual. Since the Constitution is one of the granted powers, its words should not be interpreted into a deformed and mis-shapen thing by permitting the power to be exercised by proxy.

A reading of this Act, and particularly those sections to which reference has been made, emphasize that the Congress has attempted to that for which no authority exists. By the terms of the Act, the Congress has placed in the hands of an administrator the power and right to do that which he—not the Congress—determines to be "necessary and proper" to do to carry out the Congress granted powers. The terms of the Act let another think and determine for the Congress. By the terms of the Act, Congress has virtually abdicated, washed its hands of the whole responsibility of determining what is necessary and proper. It has specified a broad field of endeavor in which it has empowered an administrator to function for it, and then only, if and when the administrator deems it "necessary and proper" so to do.

There is nothing in the fact that a great emergency exists which gives the Congress the power to shun a responsibility imposed upon it, and it alone, by the Constitution. There is no relation between the existence of a world war and the giving of an administrator unlimited power to act as his judgment may dictate that permits the Congress to successfully assert that in doing so it resorted to its implied powers.

There is nothing in the fact that a war is on which *prevented* the Congress from doing the legislating. No emergency, regardless of how great, justifies the distorting of the terms of the Constitution to permit Congress to abdicate and let another function in its stead.

The Congress merely determined that the control of rent might be necessary for the effective prosecution of the present war and for the national defense and security. It stopped there. It then provides for the appointment of an administrator to make the determination of what, if any, law there should be to affect that control.

At the time the law was enacted and approved there could have been no way by which that Congress could have known what, if anything, the administrator would do to control rent. It did not tell him what he should do. It gave him the broad field of rent in which his activities would be employed. It left the matter wholly uncertain as to what, if anything, would ever be done by him in the matter of controlling rent.

If rent was to be controlled, Congress should have said so definitely and provided *how* it would be controlled. In failing as it did, the Congress did not determine what was "necessary and proper." It did not even determine that it was necessary and proper to control rent. It only empowered an administrator to make that decision if he thought it should be controlled. It follows that the adoption of the Act was not a power exercised by Congress. It made no decision on the question of necessity and propriety. It did nothing to carry into effect either its granted or implied powers as contemplated by the Constitution.

The Constitution cannot reasonably be interpreted to mean that the power granted to Congress to determine what was necessary and proper, vested the Congress with a power to set out in an act a field of activity that might or might not

require supervision and transfer the power to an individual administrator to determine whether it should be supervised and, if a determination was made by him then to supervise it, then empower him to adopt the rules affecting the supervision, which rules, when promulgated by him, take on the character of a duly enacted law of Congress subjecting persons to fines, penalties and other punishment on violation.

(3) Unlawful Delegation of Power.

We glean from the decision in *Joseph Schechter, etc., vs. U. S.*, 295 U. S. 495, that the purposes and policy expressed were in substance to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof. The "standard" to accomplish the policy which the Attorney General contended existed were the provisions for formulating, approving and putting into effect "codes of fair competition" to effectuate that policy. Those codes were not to impose inequitable restrictions on admission to membership. They should not promote monopolies, nor should they be designed to eliminate or oppress small enterprises. The codes were not to discriminate against others but were required to effectuate the policy of the Act. Mr. Justice Cardozo aptly characterized such legislation as follows:

"The delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant. * * * Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here in effect is a roving commission to inquire into affairs and upon discovery correct them. * * * But there is another conception of codes of fair competition, their significance and function, which leads to very different consequences, though

it is one that is struggling now for recognition and acceptance. By this other conception a code is not to be restricted to the elimination of business practices that would be characterized by general acceptance as oppressive or unfair. It is to include whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected. * * * This is delegation running riot. No such platitude of power is susceptible of transfer. The statute, however, aims at nothing less as one can learn both from its terms and from the administrative practices under it."

With equal force it may be said that the delegation of power to the administrator under the Act here in question is a roving commission, and a delegation of power running riot. The administrator becomes the general agent of the Congress—first, to choose the area for legislation, then to choose the character of the legislation that he believes best suits the area selected for action, and then to promulgate such rules and regulations as he deems necessary and as he sees fit to effectuate the decision that he and he alone is empowered to make. These things he is permitted to do without a semblance of notice to or an opportunity to be heard by those whose rights, property, and even liberty are affected and are at stake.

"The true distinction is between a delegation of power to make the law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of law. The first cannot be done; to the latter no objection can be made."

Southern, Statutory Construction, Sec. 68.

The constitutional prohibition against the abdication by Congress of essential legislative functions and what are essential elements to state in a legislative act where an administrative agency is given latitude in executing it is well

stated and set forth in the following decisions:

U. S. vs. L. Cohen Grocery Co., 255 U. S. 81, 65 L. Ed. 516;

Joseph Schechter vs. U. S., 295 U. S. 495;

Panama Refining Co. vs. Ryan, 293 U. S. 388;

U. S. vs. Eaton, 144 U. S. 677;

Lynch vs. Tilden Produce Co., 265 U. S. 345;

Standard Chemicals & Metals Corp. vs. Waugh Chemical Corp., 231 N. Y. 51, 131 N. E. 566;

Wichita R. R. & Light Co. vs. Public Utilities Com., 260 U. S. 46, 67 L. Ed. 124.

The rule with respect to the right to exercise arbitrary power or discretion by an administrator is succinctly stated in 11 Am. Juris., p. 947, Sec. 234:

"In all cases where a law provides for the exercise of discretion by administrative officers, in order to be valid and escape the taint of unconstitutional exercise of legislative or judicial authority, the discretion must be lawfully exercised in accordance with established principles of justice. It cannot be a mere arbitrary choice, for it has been said that in the American system of government no rule is left for the play and acceptance of purely arbitrary power. A distinction is consequently drawn between a delegation of the power to make the law which necessarily includes a discretion as to what it shall be and the conferring of authority or discretion as to its execution. The first cannot be done, but the second under certain circumstances is permissible."

The only basis upon which it may be effectively argued that the granting of the unlimited discretionary power to the administrator under this Act is proper is that it satisfies the necessitous conditions created by the national emergency. However, there is no relation whatever between the national emergency and the granting of absolute discretionary powers to the administrator. If the power to grant the discretionary

right to act to an administrator can be justified at all it can be justified in peace time as well as in war. The war did not create the need for it. The condition of the times did not demand that it be done that way and, unless it can be sustained on the basis of a war measure, the Act must be construed as unconstitutional.

(4) No Requirement for Notice and No Opportunity to Be Heard Are Provided for in the Act—Due Process of Law Is Ignored.

The right to a notice and a hearing is a constitutional right and the depriving of a citizen of his property without notice and an opportunity to be heard amounts to the taking of property without due process of law.

Sec. 205 (b) of the Emergency Price Control Act imposes the severe penalty of \$5,000.00 fine, or imprisonment for not more than two years, in the event of a violation of the regulations promulgated by the administrator. When Congress imposed this penalty it did not and could not have known what the contents of the order or regulation might be upon which it imposed the penalty. Congress merely provided that the administrator may make the law and then, if it is violated, it is punishable. No person can read this Act and find therein what the measure of his conduct must be.

Under the Act, the administrator designates the defense-area and he may do so without any hearing, without making any finding of fact, and without any guidance except that which may be considered Divine (Sec. 302 (b)). When he has determined upon a defense-rental area, be it a state, a county, or one township in a state, or a ward in a city, he issues a declaration setting forth the necessity for and the recommendations with reference to the stabilization of rent for housing accommodations in that state, county, township

or ward (Sec. 2 (b)). The necessity for the fixing of the area is lodged solely in the judgment of the administrator, so that the matter of objections thereto and review thereof are probably properly omitted from the Act because there would be no tribunal which could superimpose its own judgment upon that of the administrator and declare that the administrator did not exercise his judgment.

The administrator sets forth in his declaration the necessity for fixing the area. Since he is required to take no testimony and make no finding, it follows that his declaration of necessity for fixing the area as he did, or does, is a matter purely of his own conclusion. Yet no person can complain.

If, within sixty days after the issuance of such recommendations by the administrator the rents are not stabilized in the area by state or local regulations, or otherwise, in accordance with the administrator's recommendations, the administrator may establish the maximum rents for the accommodations in the area. When he fixes the maximum rent he does so solely on the basis of what they, in his judgment, should be to fairly and equitably effectuate the general purposes of the Act.

If the state or local authorities should act contrary to the administrator's recommendations, the administrator's recommendations must prevail and he may establish the maximum rents regardless of what local authorities might consider reasonable and proper to effectuate the purposes of the Act in rent stabilization therein. Since local conditions may differ in different localities, and since opinions may differ in localities as to the proper stabilization of rents for that area, notice and opportunity to be heard before the area is designated and the maximum rents established is a constitutional prerequisite.

In *Minneapolis & St. Paul R. R. Co. vs. State of Minnesota*, 134 U. S. 418, 457, this Court aptly points out that:

"* * * all that the Commission is required to do is, on the filing with it by the railroad company of copies of its schedules of charges, to 'find' that any part thereof is, in respect, unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charges as the Commission 'shall declare to be equal and reasonable,' and to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the Commission has found what it is to find and declare what it is to declare, no opportunity provided for the company to introduce witnesses before the Commission, in fact, nothing which has the semblance of due process of law."

Later this Court further expounded on the principles under the Fifth Amendment in *Southern R. R. Co. vs. Virginia*, 290 U. S. 190, 194, as follows:

"If we assume that by proper legislation a state may impose upon railways the duties of eliminating grade crossings, when deemed necessary for public safety and convenience, the question here is whether the challenged statute meets the requirements of due process of law. Undoubtedly, the Acts do give an administrative officer power to make final determination in respect of facts—the character of a crossing and what is necessary for the public safety and convenience—without notice, without hearing, without evidence; and upon this *ex parte* finding not subject to general review, to ordain that expenditure shall be made for erecting a new structure. The thing so authorized is no mere police regulation.

"Under circumstances like those here disclosed no contestant could have fair opportunity for relief in a court of equity. There would be nothing to show the grounds upon which the Commissioner based his conclusion. He alone would be cognizant of the mental processes which begot his urgent opinion.

"The infirmities of the enactment are not relieved by

an indefinite right of review in respect of some action spoken of as arbitrary. Before his property can be taken under the edict of an administrative officer, appellant is entitled to a fair hearing upon the fundamental facts."

Later, in *Morgan vs. U. S.*, 298 U. S. 468, the Court reviews this doctrine:

"The proceeding is not one of ordinary administration, conformable to the standards governing duties of a purely executive character. It is a proceeding looking to the legislative action in the fixing of rents of market agencies. And, while the order is legislative and gives to the proceeding its distinct character—(*Louisville & N. R. Co. vs. Garrett*, 231 U. S. 298, 307, 58 L. Ed. 229, 240, 34 S. Ct. 48) it is a proceeding which by virtue of authority conferred has special attributes. The secretary, as the agent of Congress in making the rates must make them in accordance with the standards and under the limitations which Congress has prescribed. Congress has required the secretary to determine, as a condition of his action, that the existing rates are or will be 'unjust, unreasonable or discretionary.' If and when he so finds, he may 'determine and prescribe' what shall be the just and reasonable rate, or the maximum or minimum rate, thereafter to be charged. The duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. There must be a full hearing, there must be evidence adequate to support pertinent and necessary findings of fact. * * * Hence, it is frequently described as a proceeding of quasi judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts."

When, as here, it is within the power of the administrator issuing the order, in his discretion, to make the order operative in one way upon one person, in another way upon another person, or not at all on thousands of other persons in exactly the same situation, the result is the taking of prop-

erty of the person or persons from whom it exacts obedience, and the mandates of the Fifth Amendment require notice and hearing to assure justice.

If my neighbor's property is situated across the street, outside of the area designated by the administrator, and his property is not affected and mine is, I have a right to a hearing to determine whether or not my property shall be taken and his left undisturbed. If I rent my property for \$50.00 per month and my neighbor rents an identical property at \$65.00 per month; and we are both in the rental area, and my property is of a rental value of \$75.00 per month, but out of consideration for my tenant my rents have been maintained on a lower level, if my rent is to be frozen at the reduced rate when costs of maintenance and commodities necessary in its operation are progressively increasing, I am entitled to notice and hearing before the freezing of my rent; otherwise I am being deprived of my property without due process of law. I am entitled to know on what basis the administrator arbitrarily fixes the freeze on my rent and if I am deprived of the right to appeal from his decision, be it arbitrary or not, I am being deprived of my property without due process of law.

Cases sustaining that contention are:

Panama Refining Co. vs. Ryan, 293 U. S. 388, 341, 79 L. Ed. 446, 464;

Wichita R. R. & Light Co. vs. Public Utilities Com., 260 U. S. 48, 58, 67 L. Ed. 124, 130;

Mahler vs. Eby, 264 U. S. 32, 43, 68 L. Ed. 549, 556;

Allegheny, Topeka & Santa Fe Ry. Co. vs. U. S., 295 U. S. 193, 202, 79 L. Ed. 1382, 1390;

Morgan, et al., vs. U. S., 298 U. S. 468, 479, 80 L. Ed. 1288, 1294;

Florida vs. U. S., 282 U. S. 194, 215, 75 L. Ed. 291, 304;

Twin City Milk Producers Ass'n vs. MacNutt, etc., 122

F. (2d) 564, 566, 567;

Saginaw Broadcasting Co. vs. Federal Communications

Com., 96 F. (2d) 554, 559;

Oklahoma Operating Co. vs. Lore, 252 U. S. 331, 335, 64

L. Ed. 596, 598;

Boeing Air Transport vs. Farley, 75 F. (2d) 765, 767.

When the administrator makes a declaration that, in his judgment, the defense-rental area should be established and after establishing it, determines what the maximum and minimum rents to be charged in the area shall be, he has made a finding as to what is his judgment. How can his judgment be challenged on the ground that the finding is unsupported by any fact when in the matter, the judgment of the administrator is the standard by which to measure the sufficiency of the basis? Attack is foreclosed and by that token the Act violates the fundamental concepts of the Constitution.

Deaver, J., in *Payne vs. Griffin* (p. 36, Statement as to Jurisdiction), discusses the same point. He says:

"People know that they are charged with knowledge of the law but, without actually knowing the law, they have been accustomed to make defenses only when the law is sought to be enforced against them. An Act which permits an administrator to fix prices without notice or hearing and then makes those prices conclusive after sixty days, would, in practical operation, have the effect of cutting off defenses. This is especially true where the procedure provided makes it too inconvenient and expensive for individuals, in some cases to follow the procedure."

Again it is emphasized that there are no circumstances in the existence of a national emergency which justifies the cutting off of a right to a hearing and the requirement of a finding of fact and a right to review. No relationship can be shown between the existence of such emergency and the de-

privilege of the right. If the taking can be justified at all the right could be taken away with equal justification in times of peace as in times of war.

(5) War Does Not Nullify Constitution Nor Suspend Its Operation—Congress Is Still Required to Adopt Reasonable Means to Attain a Legitimate End.

One of the most pernicious prolations ever propounded on the theory of legislation or attempted legislation, and in rules or regulations of governmental agencies, is that which seeks to render elastic to a point of stretching beyond endure, the oft-quoted dictum that the Congress possesses power not only expressly delegated by the basic law, but also such as the Congress or the bureau determine is necessarily implied. Such a doctrine presupposes that we are to assume that an authority must exist to determine what are *necessary* powers in order to give effect to those expressly granted. It is asserted that that doctrine is for Congress alone to determine the occasion or necessity for expansion of this ambit and not for the courts to usurp that function by constrictive adjudication. In other words, it is contended that on the questions of what is, and what is not a necessarily implied power to carry into execution those powers expressly delegated, the determination of Congress is final and forecloses any further judicial review or inquiry. The position lately taken by the exponents of this doctrine in defining Congressional power, is that, however remote the subject of legislation may be from the exercise of a delegated power under the Constitution, if it have the slightest conceivable bearing on that express power, the edict in the law that it is designated to implement it shall preclude further inquiry as to its necessity to that end.

It is our belief, however, that the principles expounded

by and adhered to by this Court in *Carter vs. Carter Coal Co.*, 298 U. S. 238, must still be recognized, and that neither expediency nor liberality shall serve to justify a departure from the traditional bounds of judicial inquiry. In the *Carter* case this Court says:

"The ruling and firmly established principle is that the powers which general government may exercise are only those specifically enumerated in the Constitution and such implied powers as are necessary and proper to carry into effect the enumerated powers. Whether the end sought to be attained by an Act of Congress is legitimate is wholly a matter of constitutional power and not at all of legislative discretion. Legislative Congressional discretion begins with the choice of means and ends with the adoption of the methods and details to carry the delegated power into effect. The difference between these two things—power and discretion—is not only very plain but very important. For while the powers are rigidly limited to the enumerations of the Constitution, the means which may be employed to carry the powers into effect are not restricted, save that they must be appropriate plainly adapted to the end, and not prohibited by, but consistent with, the letter and spirit of the Constitution. *M'Culloch vs. Maryland*, 4 Wheat. 316, 421, 4 L. Ed. 579, 605. Thus, it may be said that to a constitutional end many ways are open; but to an end not within the terms of the Constitution all ways are closed."

• See *National Labor Relations Board vs. Jones and Laughlin Steel Corporation*, 301 U. S. 1, 81 L. Ed. 893;

Fed. Power Commission vs. National Gas Pipe Line Co., 86 L. Ed., p. 713.

Since the existence of a state of war does not suspend, enlarge, or change the granted powers of Congress, the pertinent inquiry is, has the Congress, in adopting the Act before the Court, employed means that are appropriate, plainly adapted to the end and not prohibited by but consistent with the letter and spirit of the Constitution? In other

words, has the Congress adopted reasonable means to attain a legitimate end; of keeping rents within prescribed limits, to protect the landlord and others in their fixed incomes.

No implied power rests in Congress because of its war power to fix rents at a certain date. There is no relation between the existence of war and the freezing of rents on the first day of March, 1942. The existence of war is not the element then which fixed the date of freezing. Wherein does there exist the implication that the granted power of the Congress, devised and bequeathed to the administrator, veneers his acts in arbitrarily freezing rents at a post dated base period, so that judicial inquiry as to its appropriations is prohibited?

It might be stated as a Congressional policy that it became necessary for Congress to control rents to prevent speculative and abnormal increase, to prevent other disruptive practice resulting from abnormal market conditions or scarcities or in the intent of national defense or to protect persons of relatively fixed income or to prevent a post emergency collapse of values. The mere announcement of the policy does not enlarge or restrict the granted power. There is no reasonable connection between the announced policy and its attempt to fix rents and freeze them as of a certain date to accomplish those purposes. By the same token there is no implication that gives it the right to permit any administrator to fix them for the Congress as of that date.

The preventing of any increase of rent over that which prevailed in a base period, arbitrarily selected, is not justified when the cost of maintenance of a landlord's property is increased to an extent that would justify a reasonable increase in his rent over that which prevailed on the base date. (See National Industrial Conference Board report on living costs.) The unreasonableness of the procedure is magnified when the freezing or fixing of rent as of base date antedates the act

of freezing. A base date for rent is selected at a period when the cost of maintenance of premises had *already increased* to justify the increase in the rent that prevailed on the date of act of freezing.

The reasonable means to attain this legitimate end and to effectuate the purposes of the Act was necessarily restricted to freezing rents at a base reasonably arrived at, for instance, by taking into consideration the cost of the landlord's capital investment, the cost of maintenance, and a reasonable return on his investment. Such a base would have had a direct relation to conditions contributing to the national emergency. Such a base would have given a true effect to the purposes of the Act. Had Congress adopted such a plan and designated an administrator for the administration of it, little complaint could have been interposed to the constitutionality of the Act. Such a law would have provided a sliding scale permitting the landlord to retain his fixed income on the basis of maintenance, whether it be up or down. Such procedure would be simple and expedient. Its administration would not have been any more complicated than ascertaining depreciation of real estate for deduction for income tax purposes. Such an act would have met the requirements of the rule announced in the *Carter* case as adopting means that were appropriate, plainly adopted to the end, and not prohibited by, but consistent with the letter and spirit of the Constitution. *Such a plan was within the power of the Congress to adopt.*

Neither the war power, nor the implied powers under the Constitution justify the freezing of rents and the fixing of the maximum amount to be charged for the use and occupation of property in the manner in which is attempted to be done under this Act.

The answer to some pertinent questions will serve to remove the point from the field of contention. Is it necessary

in the interest of national defense and security, and necessary to affect prosecution of the present war to deprive a citizen of a reasonable return on his investment because it happened to be in rental property? Is the war effort furthered by depriving him of his right to a day in court in the county or district in which he lives when he is suffering an injustice caused by arbitrarily placing him in a defense-rental area and thereby depriving him of his right to contract freely? Likewise, is the present war more effectively prosecuted by imposing on the landlord a minimum of \$50.00 remedial damages for each week or each day for an overcharge no matter how small it may be, and thereby confiscate his property for what might have been a mere inadvertent act on his part? Is it necessary for said purpose to make provision in an act in such a way as to enable a tenant claiming he did not know his rights at an earlier date, if his rent was payable weekly, to recover of his landlord a judgment of \$2,600.00 a year, or, if his rental unit was by the day, recover a judgment of \$18,000.00 a year? Is the national security furthered by leaving nothing to the trial court to do but assess the remedial damages? Are these means to the legitimate end of protecting the national defense or security and to effectively prosecute the war? Are these things plainly adapted to this end?

To say that the Congress has the right to inaugurate such a program under a law because of its war powers, or to permit an administrator to make them effective as a law, and to say further the Congress is the sole judge of whether it is right or wrong so to do, is wholly and entirely foreign to any recognized concept of justice or Congressional power.

(6) No Requirements Are Set Up to Evoke Administrative Action—When He Has Acted His Action Cannot Be Challenged Except That They Are Not in Accordance With Law, Are Arbitrary and Capricious—the Exceptions Are Without Meaning.

Sec. 204 (b) of the Act provides that, "No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the Court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious." Relief can be obtained only through the Emergency Court of Appeals created by the Act (Sec. 204 (a)).

Had the Congress incorporated into this law a provision that it would operate only in the county of Hennepin, state of Minnesota, notwithstanding it was recognized that like or similar conditions existed in other counties of the state of Minnesota which required coverage to effectuate the purposes of the Act, the Act would have been clearly void: (*U. S. vs. Yount*, 267 Fed. 861; and cases therein cited.) Inconsistent as it may seem, the Congress has empowered the administrator to do this for it. In other words, Congress has placed it within the power of an administrator to do the very thing that Congress itself is foreclosed from doing.

A review of the Act will disclose that in many instances the action of the administrator is prefaced by the permissive "may." We are not unmindful of the fact that in the statutory construction the context of the statute wherein is used the word "may;" may be construed to mean "shall." This statute cannot be so interpreted and give it life and meaning because in those instances where "may" is used with respect to action of the administrator, it is further modified by the provision that he may act *if in his judgment he determines so to do.*

Assume the administrator, in accordance with the power vested him under Sec. 302 (d) establishes the county of Hennepin, state of Minnesota as a defense-rental area and freezes rents therein as of March 1, 1942. Assume conditions of like character as exist in Hennepin County, prevail in Ramsey County. The residents of Hennepin County bitterly complain on the ground that the administrator has singled them out and arbitrarily froze the Hennepin County rents when he should have also placed the maximum on Ramsey County rents. No court could issue its mandate successfully requiring the administrator to likewise freeze the rents in Ramsey County because the Court immediately meets the barrier which could be asserted by the administrator that it was *his judgment* that it was necessary and proper to effectuate the purposes of the Act to freeze the rents in Hennepin County and not in Ramsey. No court could hold that the administrator did not act according to *his own judgment*. The administrator could successfully assert that he acted according to law because the law gives him the right to act on his own judgment. His actions are not arbitrary or capricious because he could claim and none could gainsay the fact that it was his honest judgment, that it was not necessary to touch the rents in Ramsey County to effectuate the purposes of the Act. The only possible decision on the application for such a mandate would be dismissal of the application therefor. The position of the administrator thereby became invulnerable. This analysis should prompt a voidance of the Act under the holding in the *Yount* case.

The provisions of the Act permit the administrator to take action or not take action as he sees fit. There is no remedy in a complainant if the administrator acts when he should not act or if he fails to act when he should act. It is fundamental that to clothe an act with constitutional mantle the Act must exact activity

from the administrative officer when a specified state of facts or congeries of circumstances sought to be legislated upon by the Congress, is found to exist. When the Act leaves it to the discretion of the functionary to act or not act when the statutory standard of action is found to exist those fundamentals are wholly lacking.. Not only is all *supervisory* direction of the agent then extinct but he is left to motivation as satisfies his whim and fancy. Even expediency cannot justify such legislation.

Panama Refining Co. vs. Ryan, 293 U. S. 388, 79 L. Ed. 446;

Schechter Poultry Corp. vs. U. S., 295 U. S. 495, 79 L. Ed. 570.

(7) Remedy Afforded for Relief Is Not Within the Spirit or Intent of the Constitution and Is Not Due Process.

The administrator under the Act is empowered to designate a defense-rental area as may be determined by him (Sec. 302 (b)). When that designation is made it becomes final. From the administrator's designation there is no appeal. So there is set up a program which makes an administrative order effective and binding not only *before* but *without* a hearing; contrary to the recognized concept of due process.

Opp Cotton Mills vs. Administrator, 312 U. S. 126.

He then promulgates a regulation or order which in effect becomes a law fixing the rent for that area. He may fix those rents at a base period any time from April 1, 1940, to the present time (Sec. 2 (b)). When he fixes a base which in his judgment is fit and proper and promulgates his regulations all landlords in that area are automatically subjected thereto and violation of his order immediately becomes a penal offense. It is to be noted that the landlord had noth-

ing to do with fixing either the area or the base period. He has had no opportunity to be heard up to that point. He immediately becomes subject to a law enforceable by all of the powers exercised by the United States. But this is a law formulated, fixed and promulgated by one individual. The subjected landlord's next-door neighbor, who happens to reside beyond the limits of the area designated, is not subject to that law and can rent his premises on such basis as the economic law of supply and demand affords him the opportunity.

Should the landlord in the area and subject to the regulation feel himself aggrieved by it he may file a protest with the administrator (Sec. 203 (a)). In order to prepare an effective protest, the landlord must employ an attorney; otherwise, through technicalities, he would find himself in a position where relief could not be afforded him. It will be observed that if the protest is denied and an appeal is taken to the Emergency Court of Appeals, in that Court,

"No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objections shall have been set forth by the complainant in the protest, or such evidence shall be contained in the transcript" (Sec. 204 (a)).

In order to effectively prosecute the protest before the administrator the attorney's presence before the administrator is imperative. This means that a landlord must meet the expense not only of an attorney preparing the protest, but of his expenses and *per diem* to Washington to appear before the administrator.

The Act (Sec. 203 (a)) does not specify the grounds that must be contained in the protest supporting the landlord's objections to the regulation. Therefore there is lacking a standard by which the administrator is to be governed when

he acts upon the protest.

If the protest is denied then the aggrieved landlord may file a complaint with the Emergency Court of Appeals and serve a copy on the administrator. The only grounds on which the Emergency Court of Appeals is permitted to enjoin or set aside the regulation are that the regulation "is not in accordance with law, or is arbitrary and capricious" (Sec. 204 (b)). Since no provision is made for taking testimony before the Emergency Court of Appeals, it must be presupposed that the original protest filed with the administrator must show that the administrator's regulation is not in accordance with law or is arbitrary and capricious, because this is the foundation for the jurisdiction of the Emergency Court of Appeals. Such grounds must be incorporated in the appeal complaint with respect to the protest. The Emergency Court of Appeals entertains no objections unless they are set up by the complainant in the protest. It follows that little, if any, hope for success could be held out to the landlord in his protest to the administrator because it is hardly to be supposed that the administrator, having once established the regulation or order, would concede that it was not in accordance with law, and certainly he would not concede that it was arbitrary or capricious.

To effectively prosecute the complaint before the Emergency Court of Appeals, the landlord is of necessity forced to retain counsel and again meet the *per diem* fee and expense of a second trip to Washington.

This procedure from a practical standpoint forecloses a landlord from ever contesting the validity of a regulation unless the amount of rent involved is substantial. Ordinarily the landlord's rent increase does not involve over \$5.00 or perhaps \$10.00 per month to a tenant. In the usual case one landlord, with one tenant, with a possible \$60.00 to \$120.00 per year increase in rent would be involved. It is

obvious that the expense of obtaining relief makes the pursuing of the remedy so out of proportion to the possible beneficial results to be obtained that it deprives him of the remedy itself. The relief, if obtained, would be so remote in time from the happening of the event as to wholly discourage any attempt to obtain it. By the time it was obtained the landlord would no doubt have lost his tenant by expiration of the rental term.

In the meantime the landlord must either comply with the regulation and fix his rent at the arbitrarily antedated base or he is subjected to prosecution under Sec. 205 (b). Under the regulations promulgated by the administrator, he cannot oust the tenant from the premises. Should the landlord arbitrarily or inadvertently collect rent in addition to the ceiling figure an accumulative remedy is reposed in the tenant to collect from the landlord treble the amount of the excess of rent charged over the ceiling figure, or \$50.00 per month, whichever is the greater, together with attorney's fees. The remedy for the collection of the penalty and attorney's fees is given to the tenant in the local courts of his residence, but the remedy of the landlord is not to be found there.

In the meantime if the amount involved in the landlord's justifiable increase in rent does not warrant him in pursuing the remedy above outlined, he must comply with the regulation or is subject to the criminal features of the Act. Such prosecution takes place in the Court having jurisdiction in the place of his residence. But the landlord's remedy is not to be found there.

The tenant and the government are given the right to proceed in the local courts. The landlord gets no hearing except in Washington, D. C.

In the criminal proceedings the landlord's right to attack the validity of the regulation is taken away from him. The

Court in which he is prosecuted criminally has no jurisdiction to pass on the validity of the regulation which it is claimed the landlord violated. Regardless of whether the regulation was in accordance with law, and regardless of how utterly arbitrary or capricious it may have been, the only issue before the Court trying him criminally is whether or not the landlord wilfully violated any regulation. If he knew the regulation and violated it, it follows as a matter of law, that his violation is wilful and his punishment must be inevitable regardless of how unlawful the regulation might be, regardless of how arbitrary and capricious it may be; regardless of how much the landlord may have desired to pursue the remedy before the administrator and the Emergency Court of Appeals but did not do so because of the expense involved. He must still comply with the regulation or the criminal penalties fall on him.

Because these so-called remedial steps are incorporated in the Act, it is said that the Act must be constitutional. If these are remedial procedures in the sense that they have always been recognized in this country, then may not the next Act passed by Congress (if this is held constitutional) provide still another court where the aggrieved party may be compelled to go to obtain part of his remedy, thus dividing up the jurisdictions of courts all over the country? May not the next Act provide that the first step be taken in Washington, the next step in California, and the next one in Texas, and when the remedy is either given or denied in either Court as progress is made step by step through them, other courts are ousted of jurisdiction.

If it is to be determined that the availability of courts for relief may be removed from litigant by distance and excessive costs, then may not the availability of courts be removed from litigants by other means? When availability of courts for relief is removed from litigants by any reason

it is the end of personal and property rights and protection. Due process of law is then no more.

There is nothing about the existence of a condition of war or a national emergency that makes it necessary that relief be denied a citizen in the courts of his residence. There is no relation between the preservation of the national defense and security that makes it necessary that a citizen be deprived of the convenient right to resort to his local court for his remedy. There is nothing in existing conditions that makes it necessary that the right to contest the action on the part of an administrator be so far removed from the affected party as, from a practical standpoint, to deprive him of his remedy by a resort to the local court.

It will be conceded that technically, and by processes of legerdemain, the remedy is preserved, but it is wasted into a shadow and its substance is gone. Such was never the intent expressed by the framers of or those who expound the Constitution. To sustain a law wherein is offered a mere gesture toward a remedy is, indeed, sanctioning a dangerous precedent. All recognized conceptions of due process are violated and it is gone. In this program of legislative lethargy there is lost the "cherished judicial traditions embodying the basic concept of fair play."

Morgan vs. United States, 298 U. S. 468, 56 S. Ct. 906.

B.

The Position Taken by the Lower Court That It Was Not Necessary to Decide Whether Sec. 204 (d) of the Act Was Unconstitutional, Should Be Sustained.

That part of Sec. 204 (d) of the Emergency Price Control Act, material for consideration here, provides:

"Except as provided in this Section, no court, Federal, State, or Territorial, shall have jurisdiction or pow-

er to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

Aside from and without discussing the doubtful constitutionality of such a provision, it was not controlling on the issues before the District Court in the case at bar.

The lower court had before it issues to be determined tendered by pleadings and contentions on the part of the respective parties. The administrator contended that the defendant, Mrs. Willingham, had engaged in acts and practices which constituted violations of the Emergency Price Control Act. We are not interested in what those violations were. For the purposes of this review the fact that the claims were asserted is sufficient for our purposes. The administrator further charged that the judgment entered in the Superior Court of Bibb County, Georgia, was utterly void as that court was without jurisdiction to entertain the petition upon which it was based. The claim was that the state court had been divested of such jurisdiction by force of the provisions of the said Sec. 204 (d). By making such claims the administrator invited the defendants to interpose and assert any and all defenses that they might have to the claims which the administrator asserted. The administrator, by commencing the action in the United States District Court for the Middle District of Georgia, Thomasville Division, invoked the jurisdiction of that court and by so doing placed himself in a position where a decision of that court on either the law or the facts would be controlling.

Reserving any comments embracing constitutional questions, and for the purposes here, we agree with the conten-

tion of the administrator that his right to commence the instant action was authorized by the terms of Sec. 205 (a) of the Emergency Price Control Act, notwithstanding the provisions of Sec. 265 of the Judicial Code (U. S. C. A., Title 28, Sec. 379), which provides:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In *Toucy vs. New York Life Insurance Co.*, 314 U. S. 118, 62 S. C. Rep. 139, Mr. Justice Frankfurter reviewed the legislative history of this Act, and stated:

"Regardless of the various influences which shape the enactment of Sec. 5 of the Act of March 2, 1793, the purpose and direction underlying the provisions is manifest from its terms: proceedings in the state court should be free from interference by federal injunction. The provision expresses on its face the duty of 'hands off' by the federal courts in the use of injunction to stay writ in a state court."

It is stated in the opinion in the *Toucy* case that while the Act had had little if any legislative review during the many years it has been in force some legislative review had taken place, and it is stated:

"In the course of one hundred and fifty years, Congress has made few withdrawals from this sweeping prohibition."

The decision then enumerates those withdrawals, namely: (1) bankruptcy proceedings; (2) removal of actions; (3) limitation of ship owners' liability; (4) interpleader; (5) Frazier-Lemke Act. It is not certain what is meant in the opinion by legislative review, but the fact that the Congress has made the various exceptions indicates that the Congress had indulged in some review. To that extent evidence

is of the fact that the Congress never intended to foreclose its right to make exceptions by way of withdrawals should the occasion warrant so doing. The making of the exception by way of withdrawals is not foreign to the legislative policy expressed in the Judicial Code.

Consequently, it is apparent that when the Congress made the sweeping provision which it did in Sec. 204 (d) of this Act, little doubt remains but what the Congress intended to make the Emergency Price Control provisions a further withdrawal from the Act and has done so in terms that are unequivocal. The point we make is that, so far as the determination of the issues in the case below, the Court was within its rights in passing the question of the validity of Section 204 (d) in its amendatory order of September 14th, 1943, as the lower court could properly take the position that Sec. 204 (d) was an additional exception adopted by Congress to the prohibition fixed by Sec. 265 of the Judicial Code.

There was no occasion for the lower court to pass on the validity of Sec. 204 (d) since the issues tendered to it could be completely determined by exercising jurisdiction under its general power to pass upon the constitutionality of any Act of Congress.

"Jurisdiction is the power to decide a justiciable controversy and includes questions of law as well as facts." (Emphasis ours.)

Benderup vs. Pathé Exchange; 263 U. S. 291, 68 L. Ed. 308.

With respect to the issues tendered by the administrator to the lower court the defendants interposed the defense of the constitutionality of the various provisions of the Emergency Price Control Act and particularly their right as citizens to test the validity of the Emergency Price Control Act in the state courts of Georgia.

To determine these issues it was within the realm of propriety for the lower court, not only to determine whether or not the defendants were violating any provisions of the Act or regulation and whether the defendants had a right to contest the validity of the Emergency Price Control Act in the state court, but it had the further right to pass upon the validity of the Act itself, upon which the moving party based his right for relief.

We are impressed with the discussion by Judge Deaver on the responsibilities attendant upon him to render judgment in accordance with his determination of whether an act was valid or unconstitutional. He wholesomely asserts that, when a court is called upon to render a decision, it is required to go all of the way and decide all of the issues. True to legal tradition he would not permit himself to be swayed from that course by any provision in the Act itself that might attempt to direct him to render a decision one way or another, regardless of his own personal views of the matter.

The lower court was presented with issues which brought to the surface the question of the constitutionality of the whole Act upon which the administrator had based his right to relief, and he says (p. 25, Statement as to Jurisdiction):

"If a court has jurisdiction to try a case, it has inherent power to determine whether an act on which the existence of the right of action depends, conforms to the Constitution."

The last statement on the subject will be found in *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R. R. vs. Missouri-Kansas-Texas R. Co., et al.*, decided November 22, 1943, Vol. 64, S. Ct. Rep., pp. 146, 153, wherein Mr. Justice Douglas states:

"When a court has jurisdiction it has of course au-

thority to decide the case either way.' *The Fair vs. Kohler Die & Specialty Co.*, 228 U. S. 22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716."

If Sec. 204 (d) establishes an additional exception to Sec. 265 of the Judicial Code, then, without question, the lower court had jurisdiction to try and determine the case at bar. If it had jurisdiction to try and determine, then it had the right to try and determine it in such way as that lower court felt was in accordance with law. Its decision made therein became final, subject only to review by this Court. This Court's review of that decision is hardly to be questioned in view of the provisions of the Act of August 24, 1937 (c. 754, Sec. 2, 50 Stat. 752, Title 28, U. S. C. A., Sec. 349 (a)).

CONCLUSION

The Congress has indeed departed noticeably in recent years from the precept of Thomas Jefferson that "Government is best which governs least." Whether Jefferson had the thought in mind or not is not known but retrospectively he may be said to have thought that enactments similar to the one under consideration in this case, are the subtle and insidious first steps toward ultimate loss of liberty and rights now guaranteed to the citizens of this country by the Constitution. It is this type of legislation whereby power is gathered by a few, to the permanent and irrecoverable loss of the many. It is in fact usurpation, and in his wisdom Jefferson was undoubtedly predicting such a course might be attempted.

That many wrongs have been committed, because of the power lodged in a few by the wording of this Act, is evidenced by the testimony offered before the Select Committee to Investigate Acts of Executive Agencies Beyond the Scope

of Their Authority. The first report, printed as Union Calendar No. 236, contained these words:

"Public Law 421, 77th Congress, creating the Office of Price Administration, grants too broad a discretionary power to the administrator and fails to provide a sufficiently clear definition of his power to guard against its abuse and to adequately safeguard the constitutional rights of citizens" (p. 3).

The second intermediate report of this same committee, printed as Union Calendar No. 301, states:

"The Price Control Act vested broad and tremendous powers in the Price Administrator" (p. 4).

"With the narrow limitations, both on the scope of review and extent of relief which the court may grant, your committee submits that it will be very rare when the court will be able to determine any decision of the administrator is 'arbitrary and capricious' and that therefore the scope of the judicial review provided as a safeguard in the Act is so small as to be almost non-existent" (p. 8).

"With top officials of the Office of Price Administration entertaining the opinion that Congress lacks understanding of the legislation it has enacted, your committee ceases to wonder at the frequent misinterpretations given by the agency to its guiding statutes" (p. 12).

From these reports one almost concludes that the Congress in enacting this law looked upon the Constitution somewhat as the school boy defined it as "that part in small print, in the back of the book, which nobody reads."

There are those, however, who are beginning to realize the dangerousness of the trend evidenced by this legislation. We hope others will realize it before it is too late. The Honorable Hatton W. Summers has recently written (September, 1943, Readers Digest, p. 4):

"If we think Hitler's system is better than ours, we

should have the honesty to say so instead of copying it while we denounce it."

Freedom was lost in Germany because those Machiavellian initial steps were not met and combatted by the citizens of that country. They failed to heed the admonition long ago promulgated by our courts that we should always "withstand beginnings." When Hitler first rose to power, he did it through what appeared to be legal means. He became Chancellor. The Reichstag failed to perform its functions and delegated its powers to him. Eventually, the Reichstag, having no further powers to give away, sank to the level of a common clique and awoke to the fact that Hitler had established a dictatorship in Germany.

Unless legislation such as this has the stamp of disapproval the ironic might have factual basis in that we would be spending our blood and property to establish liberty in Europe and lose that liberty at home.

It should not be forgotten that every step taken backward by mankind in its long fight for freedom has been made under the guise of some reform or in the name of patriotism while facing a foreign enemy. The case of Germany is but the latest example of this truism. As a nation we are less likely to succumb to some power from without and thus lose our liberty, than we are to be beguiled by the machinations of those within.

The type of legislation here under discussion is not merely vicious as being loosely drawn and carelessly worded. It is worse than that. It is wicked in its potential deadliness to our form of government. It departs entirely from the thought expressed by Thomas Paine that "A Constitution is not the act of a government, but of a people constituting a government," and when those in authority attempt to act outside the constitutional limitations they are asserting a power without a right granted by the people.

When the Constitution, which is the instrument through which we govern ourselves by right, is disregarded in any small detail, or by any means, no matter how trivial, or no matter under what guise—whether patriotism or emergency, it is high time that we individually counsel ourselves to protect that which has been so dearly bought and which may be lost so easily. The highest law of wisdom in a people having the noble heritage of liberty is to spend such care and thought upon the enactment of those laws as well as reviewing them for validity that not only shall there be no question of any loss of even a small portion of our freedom, but that no injustice or inequality may be committed thereunder without there be granted a speedy remedy.

Only the word of God should be held in greater reverence than the words of our Constitution. If we are to continue to be a free people we must guard as a sacred duty both the words and the meaning of our "Constitution Forever."

With these observations it is respectfully submitted that the Emergency Price Control Act of 1942, and particularly the rental control section thereof, is unconstitutional and void, and the rules and regulations promulgated thereunder are without force and effect and that the decision of the lower court should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 464.—OCTOBER TERM, 1943.

Chester Bowles, as Administrator
of the Office of Price Administra-
tion, Appellant,

vs.

Mrs. Kate C. Willingham and J. R.
Hicks, Jr.

Appeal from the District
Court of the United States
for the Middle District of
Georgia.

[March 27, 1944.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

Appellee, Mrs. Willingham of Macon, Georgia, sued in a Georgia court to restrain the issuance of certain rent orders under the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. (Supp. II) § 901) on the ground that the orders and the statutory provisions on which they rested were unconstitutional. The state court issued, *ex parte*, a temporary injunction and a show cause order. Thereupon appellant, Administrator of the Office of Price Administration, brought this suit in the federal District Court pursuant to § 205(a) of the Act and § 24(1) of the Judicial Code to restrain Mrs. Willingham from further prosecution of the state proceedings and from violation of the Act, and to restrain appellee Hicks, Bibb County sheriff, from executing or attempting to execute any orders in the state proceedings. The District Court in reliance on its earlier ruling in *Payne v. Griffin*, 51 F. Supp. 588, dismissed the Administrator's suit on bill and answer, holding that the orders in question and the provisions of the Act on which they rested were unconstitutional. The case is here on direct appeal. 50 Stat. 752, 28 U. S. C. § 349(a).

Sec. 2(b) of the Act provides in part that, "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area." Pursuant to that authority the Administrator on April 28, 1942, issued a declaration designating twenty-eight areas

in various parts of the country, including Macon, Georgia, as defense-rental areas. 7 Fed. Reg. 3193. That declaration stated that defense activities had resulted in increased housing rents in those areas¹ and that it was necessary and proper in, order to effectuate the purposes of the Act to stabilize and reduce such rents. It also contained a recommendation pursuant to § 2(b), that the maximum rent for housing accommodations rented on April 1, 1941, should be the rental for such accommodations on that date,² and that in case of accommodations not rented on April 1, 1941, or constructed thereafter provisions for the determination, adjustment, and modification of maximum rents should be made, such rents to be in principle no greater than the generally prevailing rents in the particular area on April 1, 1941. The declaration also stated in accordance with the provisions of

¹ The declaration recited that the designated areas were the location of the armed forces of the United States or of war production industries, that the influx of people had caused an acute shortage of rental housing accommodations, that most of the areas were those in which builders could secure priority ratings on critical materials for residential construction, that new construction had not been sufficient to restore normal rental markets, that surveys showed low vacancy ratios for rental housing accommodations in the areas, that defense activities had resulted in substantial and widespread increases in rents affecting most of these accommodations in the areas, and that official surveys in the areas had shown a marked upward movement in the general level of residential rents.

² See. 2(b) provides: "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area."

§ 2(b)³ that if within sixty days after April 28, 1942, such rents within the areas in question had not been stabilized or reduced by state or local regulation or otherwise in accordance with the Administrator's recommendation, the Administrator might fix the maximum rents.

On June 30, 1942, the Administrator issued Maximum Rent Regulation No. 26, effective July 1, 1942, establishing the maximum legal rents for housing in these defense areas, including Macon, Georgia. 7 Fed. Reg. 4905. It recited that the rentals had not been reduced or stabilized since the declaration of April 28, 1942, and that defense activities had resulted in increases in the rentals on or about April 1, 1941, but not prior to that date. The maximum rentals fixed for housing accommodations rented on April 1, 1941 were the rents obtained on that date. § 1388.1704(a). As respects housing accommodations not rented on April 1, 1941, but rented for the first time between that date and the effective date of the regulation, July 1, 1942—the situation involved in this case—it was provided that the maximum rent should be the first rent charged after April 1, 1941. § 1388.1704(c). But in that case it was provided that the Rent Director (designated by § 1388.1713) might order a decrease on his own initiative on the ground, among others, that the rent was higher than that generally prevailing in the area for comparable housing accommodations on April 1, 1941. § 1388.1704(c), § 1388.1705(c)(1). By Procedural Regulation No. 3, as amended (8 Fed. Reg. 526, 1798, 3534, 5481, 14811) issued pursuant to § 201(d) and § 203(a) of the Act⁴ provision was made that when the Rent Director proposed to take such action he should serve a notice upon the landlord involved, stating the proposed action and the grounds therefor. § 1300.207. Within 60 days of the final action of the Rent Director the land-

And § 2(e) provides: "Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

³ See the provisions of § 2(b) in note 2, *supra*.

⁴ Sec. 201(d) provides: "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

Sec. 203(a) provides in part: "Within a period of sixty days after the issuance of any regulation or order under section 2, or in the case of a price

lord might file an application for review by the regional administrator for the region in which the defense-rental area office was located and then file a protest with the Administrator for review of the action of the regional office (§ 1300.209, § 1300.210); or he might proceed by protest immediately. § 1300.209, § 1300.215. As we develop more fully hereafter, the Act provides in § 203(a) for the filing of protests with the Administrator. The machinery for a hearing on a protest and a determination of the issue by the Administrator (§ 1300.215-§ 1300.240) was designed to provide the basis of judicial review by the Emergency Court of Appeals as authorized by § 204(a) of the Act.

In June, 1943, the Rent Director gave written notice to Mrs. Willingham that he proposed to decrease the maximum rents for three apartments owned by her, and which had not been rented on April 1, 1941, but were first rented in the summer of 1941, on the ground that the first rents for these apartments received after April 1, 1941, were in excess of those generally prevailing in the area for comparable accommodations on April 1, 1941. Mrs. Willingham filed objections to that proposed action together with supporting affidavits. The Rent Director thereupon advised her that he would proceed to issue an order reducing the rents. Before that was done she filed her bill in the Georgia court. The present suit followed shortly, as we have said.

I. We are met at the outset with the question whether the District Court could in any event give the relief which the Administrator seeks in view of § 265 of the Judicial Code (36 Stat. 1162, 28 U. S. C. § 379) which provides that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." We recently had occasion to consider the history of § 265 and the exceptions which have been engrafted on it. *Toucey v. New York Life Ins. Co.*, 314 U. S. 118. In that case we listed

schedule, within a period of sixty days after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator."

the few Acts of Congress passed since its first enactment in 1793 which operate as implied legislative amendments to it. 314 U. S. pp. 132-134. There should now be added to that list the exception created by the Emergency Price Control Act of 1942. By § 205(a), the Administrator is given authority to seek injunctive relief in the appropriate court (including the federal district courts) against acts or practices in violation of § 4, e. g., the receipt of rent in violation of any regulation or order under § 2. Moreover, by § 204(d) of the Act one who seeks to restrain or set aside any order of the Administrator or any provision of the Act is confined to the judicial review granted to the Emergency Court of Appeals, which was created by § 204(c) and to this Court.⁵ As we recently held in *Lockerty v. Phillips*, 319 U. S. 182, 186, 187, Congress confined jurisdiction to grant equitable relief to that narrow channel and withheld such jurisdiction from every other federal and state court. Congress thus preempted jurisdiction in favor of the Emergency Court to the exclusion of state courts.⁶ The rule expressed in § 265 which is designed to avoid collisions between state and federal authorities (*Toucey v. New York Life Ins. Co., supra*) thus does not come into play. The powers of the District Court under § 205(a) of the Act and § 24(1) of the Judicial Code are ample authority for that court to protect the exclusive federal jurisdiction which Congress created.

The suggestion is made that Congress could not constitutionally withhold from the courts of the States jurisdiction to entertain

⁵ See. 204(d) provides in part: "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

It should also be noted that § 204(e) withdraws from the Emergency Court power "to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206."

⁶ It is true that § 205(c) gives to state and territorial courts concurrent jurisdiction of all proceedings (except criminal proceedings) under § 205 of the Act. But they embrace only enforcement suits brought by the Administrator, not suits brought to restrain or enjoin enforcement of the Act or orders or regulations thereunder.

suits attacking the Act on constitutional grounds. But we have here a controversy which arises under the Constitution and laws of the United States and is therefore within the judicial power of the United States as defined in Art. III, § 2 of the Constitution. Hence Congress could determine whether the federal courts which it established should have exclusive jurisdiction of such cases or whether they should exercise that jurisdiction concurrently with the courts of the States. *Plaquemines Fruit Co. v. Henderson*, 170 U. S. 511, 517; *The Moses Taylor*, 4 Wall. 411, 428-430. And see *Tennessee v. Davis*, 100 U. S. 257; *McKay v. Kalyton*, 204 U. S. 458, 468-469. Under the present Act all jurisdiction has not been withheld from state courts, since they have concurrent jurisdiction over all civil enforcement suits brought by the Administrator. § 205(e). But the authority of Congress to withhold all jurisdiction from the state courts obviously includes the power to restrict the occasions when that jurisdiction may be invoked.

II. The question of the constitutionality of the rent control provisions of the Act⁷ raises issues related to those considered in *Yakus v. United States*, No. 374, and *Rottenberg v. United States*, No. 375, decided this day.

When it came to rents Congress pursued the policy it adopted respecting commodity prices. It established standards for administrative action and left with the Administrator the decision when the rent controls of the Act should be invoked. He is empowered to fix maximum rents for housing accommodations in any defense-rental area,⁸ whenever in his judgment that action is necessary or proper in order to effectuate the purposes of the Act. A defense-rental area is any area "designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes" of the Act. § 302(d). The controls adopted by Congress were thought necessary "in the interest of the national defense and security" and for the "effective prosecution of the present war." Sec. 1(a). They have as their aim the effective protection of our price structures against the forces of disorganization and the pressures created by war and its at-

⁷ Here as in *Yakus v. United States*, *supra*, the Administrator concedes that if an enforcement suit the constitutionality of the Act as distinguished from the constitutionality of orders or regulations under the Act is open. As pointed out in the *Yakus* case, reliance is placed on § 204(d), *supra* note 5. And see S. Rep. No. 931, 77th Cong., 2d Sess., pp. 24-25.

⁸ The terms rent, defense-rental area, defense-area housing accommodations, and housing accommodations are defined in § 302 of the Act.

tendant activities.* § 1(a); S. Rep. No. 931, 77th Cong., 2d Sess., pp. 1-5. Thus the policy of the Act is clear. The maximum rents fixed by the Administrator are those which "in his judgment" will be "generally fair and equitable and will effectuate the purposes of this Act." § 2(b). But Congress did not leave the Administrator with that general standard; it supplied criteria for its application by stating that so far as practicable the Administrator in establishing any maximum rent should ascertain and give consideration to the rents prevailing for the accommodations, or comparable ones, on April 1, 1941. The Administrator, however, may choose an earlier or later date if defense activities have caused increased rents prior or subsequent to April 1, 1941. But in no event may the Administrator select a date earlier than April 1, 1940. And in determining a maximum rent "he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs." § 2(b). And Congress has provided that the Administrator "may provide for such adjustments and reasonable exceptions" as in his judgment are "necessary or proper in order to effectuate the purposes of this Act." § 2(c).

The considerations which support the delegation of authority under this Act over commodity prices (*Yakus v. United States*) are equally applicable here. The power to legislate which the Constitution says "shall be vested" in Congress (Art. I, § 1) has not been granted to the Administrator. Congress in § 1(a) of the Act has made clear its policy of waging war on inflation. In § 2(b) it has defined the circumstances when its announced policy

* Sec. 1(a) provides in part: "It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes."

is to be declared operative and the method by which it is to be effectuated. Those steps constitute the performance of the legislative function in the constitutional sense. *Opp Cotton Mills, Inc. v. Administrator*, 312 U. S. 126, 144.

There is no grant of unbridled administrative discretion as appellee argues. Congress has not told the Administrator to fix rents whenever and wherever he might like and at whatever levels he pleases. Congress has directed that maximum rents be fixed in those areas where defense activities have resulted or threaten to result in increased rentals inconsistent with the purpose of the Act. And it has supplied the standard and the base period to guide the Administrator in determining what the maximum rentals should be in a given area. The criteria to guide the Administrator are certainly not more vague than the standards governing the determination by the Secretary of Agriculture in *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533, 576-577, of marketing areas and minimum prices for milk. The question of how far Congress should go in filling in the details of the standards which its administrative agency is to apply raises large issues of policy. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 398. We recently stated in connection with this problem of delegation, "The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable." *Opp Cotton Mills, Inc. v. Administrator*, *supra*, p. 145. In terms of hard-headed practicalities Congress frequently could not perform its functions if it were required to make an appraisal of the myriad of facts applicable to varying situations, area by area throughout the land, and then to determine in each case what should be done. Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. In our complex economy that indeed is frequently the only way in which the legislative process can go forward. Whether a particular grant of authority to an officer or agency is wise or unwise, raises questions which are none of our concern. Our inquiry ends with the constitutional issue. Congress here has specified the basic conclusions of fact upon the ascertainment of which by the Administrator its statutory command is to become effective. But that is not all. The Administrator on the denial of protests must inform the protestant of the "grounds upon which" the decision is based and of any "economic data and other facts of which the Administrator has taken official notice". § 203(a). These materials

and the grounds for decision which they furnished are included in the transcript on which judicial review is based. § 204(a). We fail to see how more could be required (*Taylor v. Brown*, 137 F. 2d 654, 658-659) unless we were to say that Congress rather than the Administrator should determine the exact rentals which Mrs. Willingham might exact.

As we have pointed out and as more fully developed in *Yakus v. United States*, *supra*, § 203(a) of the Act provides for the filing of a protest with the Administrator against any regulation or order under § 2. Moreover, any person "aggrieved" may secure judicial review of the action of the Administrator in the Emergency Court of Appeals. § 204(a). And that review is on a transcript which includes "a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice." § 204(a). Here, as in the *Yakus* case, the standards prescribed by the Act are adequate for the judicial review which has been accorded. The fact that there is a zone for the exercise of discretion by the Administrator is no more fatal here than in other situations where Congress has prescribed the general standard and has left to an administrative agency the determination of the precise situations to which the provisions of the Act will be applied and the weight to be accorded various statutory criteria on given facts. *Opp Cotton Mills, Inc. v. Administrator*, *supra*; *Yakus v. United States*, *supra*.

Thus so far as delegation of authority is concerned, the rent control provisions of the Act, like the price control provisions (*Yakus v. United States*, *supra*), meet the requirements which this Court has previously held to be adequate for peace-time legislation.

III. It is said, however, that § 2(b) of the Act is unconstitutional because it requires the Administrator to fix maximum rents which are "generally fair and equitable". The argument is that a rental which is "generally fair and equitable" may be most unfair and inequitable as applied to a particular landlord and that a statute which does not provide for a fair rental to each landlord is unconstitutional. During the first World War the statute for the control of rents in the District of Columbia provided machinery for securing to a landlord a reasonable rental. *Block v. Hirsh*, 256 U. S. 135, 157. And see *Edgar A. Levy Leasing Co. v. Siegel*, 258 U. S. 242. And under other price-fixing statutes such as the Natural Gas Act of 1938 (52 Stat. 821, 15 U. S. C. § 717) Congress has provided for the fixing of rates which are just and reasonable in their application to particular persons or companies. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591. Con-

gress departed from that pattern when it came to the present Act. It has been pointed out that any attempt to fix rents, landlord by landlord, as in the fashion of utility rates, would have been quite impossible. *Wilson v. Brown*, 137 F. 2d 348, 352-354. Such considerations of feasibility and practicality are certainly germane to the constitutional issue. *Jacob Ruppert v. Caffey*, 251 U. S. 264, 299; *Opp Cotton Mills, Inc. v. Administrator*, *supra*, p. 145. Moreover, there would be no constitutional objection if Congress as a war emergency measure had itself fixed the maximum rents in these areas. We are not dealing here with a situation which involves a "taking" of property. *Wilson v. Brown*, *supra*. By § 4(d) of the Act it is provided that "nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." There is no requirement that the apartments in question be used for purposes which bring them under the Act. Of course, price control, the same as other forms of regulation, may reduce the value of the property regulated. But, as we have pointed out in the *Hope Natural Gas Co.* case (320 U. S. p. 601), that does not mean that the regulation is unconstitutional. Mr. Justice Holmes, speaking for the Court, stated in *Block v. Hirsh*, *supra*, p. 155: "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay." A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power. *L'Hotte v. New Orleans*, 177 U. S. 587, 598; *Welch v. Swasey*, 214 U. S. 91; *Hebe Co. v. Shaw*, 248 U. S. 297; *Pierce Oil Corp. v. City of Hope*, 248 U. S. 498; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 157; *Euclid v. Ambler Realty Co.*, 272 U. S. 365; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379. And the restraints imposed on the national government in this regard by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth. *Hamilton v. Kentucky Distilleries Co.*, *supra*; *United States v. Darby*, 312 U. S. 100.

It is implicit in cases such as *Nebbia v. New York*, 291 U. S. 502, which involved the power of New York to fix the minimum and maximum prices of milk, and *Sunshine Anthracite Coal Co. v. Adkins, supra*, which involved the power of the Bituminous Coal Commission to fix minimum and maximum prices of bituminous coal, that high cost operators may be more seriously affected by price control than others. But it has never been thought that price-fixing, otherwise valid, was improper because it was on a class rather than an individual basis. Indeed, the decision in *Munn v. Illinois*, 94 U. S. 113, the pioneer case in this Court, involved a legislative schedule of maximum prices for a defined class of warehouses and was sustained on that basis. We need not determine what constitutional limits there are to price-fixing legislation. Congress was dealing here with conditions created by activities resulting from a great war effort. *Yakus v. United States, supra*. A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a "fair return" on his property.

IV. It is finally suggested that the Act violates the Fifth Amendment because it makes no provision for a hearing to landlords before the order or regulation fixing rents becomes effective. Obviously, Congress would have been under no necessity to give notice and provide a hearing before it acted, had it decided to fix rents on a national basis the same as it did for the District of Columbia. See 55 Stat. 788. We agree with the Emergency Court of Appeals (*Avant v. Bowles*, 139 F. 2d 702) that Congress need not make that requirement when it delegates the task to an administrative agency. In *Bi-Metallic Investment Co. v. State Board*, 239 U. S. 441, a suit was brought by a taxpayer and landowner to enjoin a Colorado Board from putting in effect an order which increased the valuation of all taxable property in Denver 40 per cent. Such action, it was alleged, violated the Fourteenth Amendment as the plaintiff was given no opportunity to be heard. Mr. Justice Holmes, speaking for the Court, stated, p. 445: "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights

are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." We need not go so far in the present case. Here Congress has provided for judicial review of the Administrator's action. To be sure, that review comes after the order has been promulgated; and no provision for a stay is made. But as we have held in *Yakus v. United States, supra*, that review satisfies the requirements of due process. As stated by Mr. Justice Brandeis for a unanimous Court in *Phillips v. Commissioner*, 283 U. S. 589, 596-597: "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process if the opportunity given for the ultimate judicial determination of the liability is adequate. *Springer v. United States*, 102 U. S. 586, 593; *Scottish Union & National Ins. Co. v. Bowland*, 196 U. S. 611, 631. Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied."

Language in the cases that due process requires a hearing before the administrative order becomes effective (*Morgan v. United States*, 304 U. S. 1, 19-20; *Opp Cotton Mills, Inc. v. Administrator, supra*, pp. 152-153) is to be explained on two grounds. In the first place the statutes there involved required that procedure.

Secondly, as we have held in *Yakus v. United States, supra*, Congress was dealing here with the exigencies of war time conditions and the insistent demands of inflation control. Cf. *Porter v. Investors Syndicate*, 286 U. S. 461, 471. Congress chose not to fix rents in specified areas or on a national scale by legislative fiat. It chose a method designed to meet the needs for rent control as they might arise and to accord some leeway for adjustment within the formula which it prescribed. At the same time the procedure which Congress adopted was selected with the view of eliminating the necessity for "lengthy and costly trials with concomitant dissipation of the time and energies of all concerned in litigation rather than in the common war effort." S. Rep. No. 931, 77th Cong., 2d Sess., p. 7. To require hearings for thousands of landlords before any rent control order could be made effective might have defeated the program of price control. Or Congress might well have thought so. National security might not be able to afford the luxuries of litigation and the long delays which preliminary hearings traditionally have entailed.

We fully recognize, as did the Court in *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U. S. 398, 426, that "even the war power does not remove constitutional limitations safeguarding essential liberties." And see *Hamilton v. Kentucky Distilleries Co.*, *supra*, p. 155. But where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires.

Other objections are raised concerning the regulations or orders fixing the rents. But these may be considered only by the Emergency Court of Appeals on the review provided by § 204. *Yakus v. United States*, *supra*.

Reversed.

SUPREME COURT OF THE UNITED STATES.

No. 464.—OCTOBER TERM, 1943.

Chester Bowles, as Administrator
of the Office of Price Adminis-
tration, Appellant,

vs.
Mrs. Kate C. Willingham and
J. R. Hicks, Jr.

Appeal from the District
Court of the United States
for the Middle District of
Georgia.

[March 27, 1944.]

Mr. Justice RUTLEDGE, concurring.

I concur in the result and substantially in the Court's opinion, except for qualifications expressed below. In view of these and my difference from the Court's position in *Yakus v. United States*, No. 374, and *Rottenberg v. United States*, No. 375, decided this day, a statement of reasons for concurrence here is appropriate.

I.

With reference to the substantive aspects of the legislation, I would add here only the following. Since the phases in issue in this case relate to real estate rentals, it is not amiss to note that these ordinarily are within the state's power to regulate rather than that of the federal government. But their relation, both to the general system of controlling wartime price inflation and to the special problems of housing created in particular areas by war activities, gives adequate ground for exercise of federal power over them.

Likewise, with respect to the delegation of authority to the administrator to designate "defense rental areas" and to fix maximum rentals within them, the same considerations, and others, sustain the delegation as do that to fix prices of commodities generally. The power to specify defense rental areas, rather than amounting to an excess of permissible delegation, is actually a limitation upon the administrator's authority, restricting it to regions where the facts, not merely his judgment, make control of

rents necessary both to keep down inflation and to carry on the war activities concentrated in them. Accordingly, I concur fully with the Court's expressed views concerning the substantive features of the legislation.

II.

This appeal presents two kinds of jurisdictional and procedural questions, though they are not unrelated. The first sort relate to the power of the District Court to restrain the further prosecution of the state court proceedings and the execution of, or attempts to execute, orders issued in them. The other issues relate to the District Court's power to restrain Mrs. Willingham from violating the Emergency Price Control Act and the orders issued pursuant to it affecting her interests.

As to the former, I have no doubt that the District Court had power, for the reasons stated by the Court, to restrain the prosecution of the suit in the state court and the execution of orders made by it. By Section 204(d) of the Act, Congress withheld from all courts, including the state courts, with an exception in the case of the Emergency Court of Appeals and this Court on review of its judgments, "jurisdiction . . . to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision." The single exception was the power of the Emergency Court by its final judgment, or of this Court on final disposition in review thereof, Section 204(a), (b), to set aside an order or regulation. Congress clearly had the power thus to confine the equity jurisdiction of the federal courts and to make its mandate for uninterrupted operation of the rent control system effective by prohibiting the state courts so to interfere with the statutory plan, at least until it should be shown invalid by the channel created for this purpose.¹ Any effort of the state court therefore to enjoin the issuance of rent orders or suspend their operation, whether on constitutional or other grounds, was directly in the teeth of the statute's explicit provisions and a violation of its terms. By this mandate the state courts were not

¹ *The Moses Taylor*, 4 Wall. 411; cf. *Clafin v. Houseman, Assignee*, 93 U. S. 180, *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511.

required to give their sanction to enforcement of an unconstitutional act or regulation or even of one which might turn out to be such. They were merely commanded to keep hands off and leave decision upon the validity of the statute or the regulations, for purposes of suspending or setting them aside, to another forum established for that purpose. Congress clearly had the power and the intent to authorize federal courts to enforce this command, by injunction if necessary.

III.

In vesting jurisdiction in the federal district courts to enjoin violations of the Price Control Act and regulations issued pursuant to it, Congress included not only violations of the statute's prohibition directed to the state courts against staying enforcement but other violations as well. The District Court, acting in the exercise of that jurisdiction, rested its judgment on the decision of a question it was authorized to consider, namely, whether the Act, rather than merely a regulation issued under it, is invalid. Since the court decided that question erroneously in disposing of this case, reversal of its judgment would be required. And perhaps in strictness this is all that it would be necessary to decide at this time.

But the contention has been made earnestly all through these proceedings that the regulations, on the basis of which any injunction obtained by the administrator must rest, are invalid and beyond his authority under the Act. And the Court, relying upon the decision in the *Yakus* and *Rottenberg* cases, has indicated that these contentions may not be considered in a proceeding of this character.

From what already has been said, it is clear the contention misconceives the administrator's rights with respect to an injunction restraining the further prosecution of the state suit and execution of the state court's orders. His right to such an injunction may rest on considerations entirely different from those governing his right to secure an injunction restraining Mrs. Willingham from violating the regulation. The former could be founded wholly upon the power of Congress to require the state courts to keep hands entirely off, in the discharge of federal functions by federal officials, at any rate during such time as might be required for

decision, with finality, upon the validity of the statute and regulations issued under it by an appropriate alternative federal method. The latter, however, presents the different question whether Congress can require the federal district courts, organized under Article III and vested by it with the judicial power, not merely to keep hands off, but by affirmative exercise of their powers to give permanent sanction to the legislative or administrative command, notwithstanding it is or may be in conflict with some constitutional mandate.

That Congress can require the court exercising the civil jurisdiction in equity to refrain from staying statutory provisions and regulations is clear. Whether the enforcing court acts civilly or criminally, in circumstances like these, Congress can cut off its power to stay or suspend the operation of the statute or the regulation pending final decision that it is invalid. But this leaves the question whether Congress also can confer the equity jurisdiction to decree enforcement and at the same time deprive the court of power to consider the validity of the law or regulation and to govern its decree accordingly.

Different considerations, in part, determine this question from those controlling when enforcement is by criminal sanction. The constitutional limitations specially applicable to criminal trials fall to one side. Those relating to due process of law in civil proceedings, including whatever matters affecting discrimination are applicable under the Fifth Amendment, and to the independence of the judicial power under Article III, in relation to civil proceedings, remain applicable. Since in these cases the rights involved are rights of property, not of personal liberty or life as in criminal proceedings, the consequences, though serious, are not of the same moment under our system, as appears from the fact they are not secured by the same procedural protections in trial. It is in this respect perhaps that our basic law, following the common law, most clearly places the rights to life and to liberty above those of property.

All this is pertinent to whether Congress, in providing for civil enforcement of the Act and the regulations, can do what in my opinion it cannot require by way of criminal enforcement of this statute, namely, by providing the single opportunity to challenge the validity of the regulation and making this available for the limited time, constitute the method afforded the exclusive mode

for securing decision of that question and, either by virtue of the taking advantage of it or by virtue of the failure to do so within the time allowed, foreclose further opportunity for considering it.

In my opinion Congress can do this, subject however to the following limitations or reservations, which I think should be stated explicitly: (1) The order or regulation must not be invalid on its face; (2) the previous opportunity must be adequate for the purpose prescribed, in the constitutional sense; and (3), what is a corollary of the second limitation or implicit in it, the circumstances and nature of the substantive problem dealt with by the legislation must be such that they justify both the creation of the special remedy and the requirement that it be followed to the exclusion of others normally available.

In this case, in my judgment, these conditions concur to justify the procedure Congress has specified. Except for the charge that the regulations, or some of them, are so vague and indefinite as to be incapable of enforcement, there is nothing to suggest they are invalid on their face. And they clearly are not so, either in the respect specified or otherwise.² The proceeding by protest and appeal through the Emergency Court, even for civil consequences only, approaches the limit of adequacy in the constitutional sense, both by reason of its summary character³ and because of the shortness of the period allowed for following it.⁴ A reservation perhaps

² The maximum rentals established in the regulation are definite and easily enough ascertainable. Appellee's complaint against the regulation on the score of vagueness is addressed to the indefiniteness of the standards which the administrator has prescribed as a guide for his office in making decreases in maximum rentals, more particularly to Section 5(c)(1), which authorizes a decrease in the maximum if it is "higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on April 1, 1941." But assuming this complaint is otherwise meritorious, the standards thus provided are no less definite than those contained in the Act itself and the contention is therefore disposed of by the determination of the constitutionality of the Act.

³ Cf. the writer's dissenting opinion in *Yakus v. United States*, No. 374, decided this day.

⁴ Under the Act a protest against a regulation must be made within sixty days of its issuance, but if based on grounds arising after the sixty days, it may be filed "at any time" thereafter.

But under the Administrator's Revised Procedural Regulation No. 3, § 1300.216, "a protest against a provision of a maximum rent regulation based solely on grounds arising after the date of issuance of such maximum rent regulation shall be filed within a period of sixty days after the protestant has had, or could reasonably have had, notice of the existence of such grounds."

is in order in the latter respect, when facts are discovered after the period which, if proven, would invalidate the regulation and which by reasonable diligence could not have been discovered before the period ends. Finally, it hardly can be disputed that the substantive problem and the circumstances which created and surrounded it were such as, if ever they could be, to justify a procedure of this sort.⁵

Accordingly, I agree that, as against the challenges made here, the special remedy provided by the Act was adequate and appropriate, in the constitutional sense, for the determination of appellee's rights with civil effects, had she followed it. And her failure to follow it produced no such irrevocable and harmful consequences, for such purposes, as would ensue if she were charged with violation as a crime. Accordingly, by declining to take the plain way opened to her, more inconvenient though that may have been, and taking her misconceived remedy by another route, she has arrived where she might well have expected, at the wrong end.

No doubt this was due to a misconception of her rights, both as a matter of substance and as one of procedure, due perhaps to failure to take full account of the reach of the nation's power in war. Nevertheless, the Court not improperly has set at rest some of her misconceptions concerning the effects of the regulations. Thus, it is held that the statute is not invalid in providing for maximum rents which are "generally fair and equitable." Section 2(b). It does not lessen the effect of this ruling for purposes of deciding the regulation's validity, that Maximum Rent Regulation Number 26, Section 5(e)(1), of which appellee complained on various constitutional grounds, including confiscation, provided that the administrator might order a decrease of the maximum rent for specified housing accommodations only on the ground that that rent "is higher than the rent generally prevailing in the defense rental area for comparable housing accommodations on April 1, 1941." (Italics added.)

Other issues raised by the appellee with respect to the regulations likewise are disposed of by the rulings upon the statute's provisions.⁶ In so far as the regulations are identical with the

⁵ Cf. The writer's dissenting opinion in *Yakus v. United States*, No. 374, decided this day.

⁶ E. g. the contention that the regulation, like the Act, improperly delegates to the administrator and his agents "legislative" power.

statute, therefore, and the objections to them are identical, the disposition of these objections to the Act disposes also of those made to the regulations. In so far as the latter raised questions not raised concerning the statute, and since none of these, except as mentioned above, called attention to any feature making a regulation void on its face, the appellee has foreclosed her opportunity to assert them, as to facts existing when the suit was begun, by her failure to follow the prescribed special remedy. It is not unreasonable, in a matter of this importance and urgency, to require one, whose only valid objection to the law, including the regulations, rests in proof of facts not apparent to the administrator or the court, to make his proof in the manner provided and to do so promptly, as a condition to securing equitable or other civil relief.

SUPREME COURT OF THE UNITED STATES.

No. 464.—OCTOBER TERM, 1943.

Chester Bowles, as Administrator
of the Office of Price Adminis-
tration, Appellant,
vs.
Mrs. Kate C. Willingham and
J. R. Hicks, Jr.

Appeal from the District
Court of the United States
for the Middle District of
Georgia.

[March 27, 1944.]

Mr. Justice ROBERTS.

I should be content if reversal of the District Court's decision were upon the ground that that court lacked power to enjoin prosecution of the appellees' state court suit. The policy expressed in § 265 of the Judicial Code applies in this instance. Moreover, if the provision of § 204(d) of the Emergency Price Control Act is valid, the lack of jurisdiction of the state court could, and should, have been raised in that court and review of its ruling could have been obtained by established means of resort to this court. Since, however, the court has determined that the District Court acted within its competency in enjoining further prosecution of the state court suit, other issues must be faced.

The appellant in his complaint charged that the appellees threatened to disobey the provisions of the Act and the regulations made pursuant to it. The appellees answered that the Act and the regulations were void because in excess of the powers of Congress. I do not understand the Administrator to contend that the court below was precluded by the terms of the statute from passing upon the question whether the Act constitutes an unconstitutional delegation of legislative power. I am not sure whether he asserts that the provisions of § 204(d), which purport to prohibit any court, except the Emergency Court of Appeals created by the Act, from considering the validity of any regulation or order made under the Act, prevent consideration of the Administrator's rent regulations and orders here under attack. If so, I think the contention is untenable.

The statute of its own force is not applicable in any area except the District of Columbia unless and until so made by a regulation of the Administrator. The statutory provisions respecting rentals amount only to conference of authority on the Administrator to make regulations and do not themselves prescribe or constrain any conduct on the part of the citizen. In short, one cannot violate the provisions of the statute unless they are implemented by administrative regulations or orders. To say then that, while the court in which the Administrator seeks enforcement of the Act, and regulations made under it, has jurisdiction to pass upon the constitutionality of the Act, it may not consider the validity of pertinent regulations, is to say that the court is to consider the Act *in vacuo* and wholly apart from its application to the defendant against whom enforcement is sought. Under the uninterrupted current of authority the argument must be rejected.

This brings me to a consideration of the appellees' principal contention, namely, that, as applied to rent control, the Emergency Price Control Act is an unconstitutional delegation of legislative power to an administrative officer. In approaching this question it is hardly necessary to state the controlling principles which have been reiterated in recent decisions.¹ Congress may perform its legislative function by laying down policies and establishing standards while leaving administrative officials free to make rules within the prescribed limits and to ascertain facts to which the declared policy is to apply. But any delegation which goes beyond the application and execution of the law as declared by Congress is invalid.

Congress cannot delegate the power to make a law or refrain from making it; to determine to whom the law shall be applicable and to whom not; to determine what the law shall command and what not. Candid appraisal of the rent control provisions of the Act in question discloses that Congress has delegated the law making power *in toto* to an administrative officer.

As already stated, the Act is not in itself effective with respect to rents. It creates an Office of Price Administration to be under the direction of a Price Administrator appointed by the President (50 U. S. C. § 921(a)). This official is authorized "when ever in [his] judgment . . . such action is necessary or proper

¹ *Panama Refining Co. v. Ryan*, 293 U. S. 388; *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495.

in order to effectuate the purposes" of the Act to issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for accommodations within a particular defense-rental area. If, within sixty days such rents within such area have not "in the judgment of the Administrator" been stabilized or reduced in accordance with his recommendations he may, by regulation or order, establish such maximum rent or maximum rents for such accommodations "as in his judgment will be generally fair and equitable and will effectuate the purposes" of the Act. "So far as practicable" in establishing maximum rents he is to ascertain and duly consider the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted, or threaten to result, in increases in rents of housing accommodations in such area inconsistent with the purposes of the Act, then on or about a date (not earlier than April 1, 1940) which, "in the judgment of the Administrator" does not reflect such increases); and he shall make adjustments "for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs." "In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable," consider recommendations made by State and local officials (50 U. S. C. § 902(b)). The form and the manner of establishing a regulation or order, the insertion of classifications and differentiations, the provisions for adjustments and reasonable exceptions lie wholly "in the judgment of the Administrator" as to their necessity or propriety in order to effectuate the purposes of the Act (50 U. S. C. § 902(c)).

The "judgment of the Administrator" as to what is necessary and proper to effectuate the purposes of the Act is the only condition precedent for his issue of an order, regulation, or prohibition, affecting speculative or manipulative practices or renting or leasing practices in connection with any defense-area housing accommodations, which practices "in his judgment" are equiva-

lent to or are likely to result in rent increases inconsistent with the purposes of the Act (50 U. S. C. § 902(d)).

At the moment these statutory provisions were adopted rent control was not effective in any part of the nation. The Administrator was appointed for the purpose of enacting such control by regulations and orders. As will be seen, the first step he was authorized to take was to issue a declaration stating the necessity for reduction of rents within a particular defense-rental area and recommendations as to the nature of such reductions.

How is the reader of the statute to know what is meant by the term "defense-rental area"? The statutory "standard" is this:

"The term 'defense-rental area' means the District of Columbia and any area designated by the Administrator as an area where *defense activities* have resulted or *threaten* to result in an increase in the rents for housing accommodations *inconsistent with the purposes of this Act.*" (Italics supplied.) (50 U. S. C. § 942(d)).

Save for the District of Columbia, the designation of an area where the Act is to operate depends wholly upon the Administrator's judgment that so-called defense activities have resulted or threaten to result in an increase of rents inconsistent with the purposes of the Act. Note that the judgment involved is solely that of the Administrator. He need find no facts, he need make no inquiry, he need not, unless he thinks it practicable, even consult local authorities. In exercising his judgment the Administrator must be persuaded that "defense activities" have caused or will cause a rise in rents. The statute nowhere defines or gives a hint as to what defense activities are. In time of war it is conceivable that an honest official might consider any type of work a defense activity. His judgment, however exorbitant, determines the coverage of the Act. It is true that he is authorized to make such studies and investigations as he deems necessary or proper to assist him in prescribing regulations or orders (50 U. S. C. § 922(a)), but his unfettered judgment is conclusive whether any are necessary or proper.

But is not the Administrator's judgment channeled and confined by the final limitation that his action must be the promotion of the "purposes of this Act"? What are they? So far as material they are: "To prevent speculative, unwarranted, and abnormal increases in . . . rents" (50 U. S. C. § 901(a)). There

are other general phrases in the section which may be claimed to throw some light on the considerations the Administrator may entertain but, so far as rents are concerned, they are so vague as to be useless; as, for example, the protection of persons with relatively fixed and limited incomes, consumers, wage earners, investors and persons dependent on life insurance, annuities, and pensions from undue impairment of their standard of living, and more of the same. I have discussed these "standards" in an opinion filed in *Yakus v. United States*, No. 374.

Language could not more aptly fit this grant of power than that used in *Schechter v. United States, supra*, at p. 551: "Here in effect is a roving commission to inquire into evils and upon discovery correct them." Equally apposite is what was said at p. 541: "It [the Act] does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered."

Placing the relevant sections of the statute together we find that the term "defense-rental area" means any area designated by the Administrator as an area where "defense activities" have resulted, or threaten to result, in "speculative, unwarranted, and abnormal increases in . . . rents". Can anyone assert that Congress has thus laid down a standard to control the action of the executive? The Administrator, and he alone, is to say what increase is speculative, what increase is unwarranted, and what increase is abnormal. What facts is he to consider? Such as he chooses. What facts did he consider in the instant case? One cannot know.

But the matter does not stop here. We have now only arrived at the designation of an area by the Administrator. As we have seen, his next step is to issue a declaration or recommendation. How shall he determine whether to do so or not? As seen by the

above summary of the Act's provisions, the matter rests in the judgment of the Administrator as to whether such action is necessary or proper to effectuate the purposes of the Act. We have just seen what those purposes are. Again his sole and untrammeled judgment as to what is needed to prevent speculative, unwarranted or abnormal increases is the only criterion of his action. The public records show that declarations made by him merely state that, in his judgment, the basic fact exists. He makes no findings; he is not bound to make any specific inquiry; he issues a fiat. No one is to be advised as to the basis of his judgment; no one need be heard.

Does the statute afford a standard for the Administrator to follow in deciding the quantity of the reduction? Again his judgment alone is determinative. And, more, in his judgment alone rests the decision as to what accommodations within the area are to be affected by the decreed reduction. He may recommend the reduction of rent for "any accommodations" within the defense-rental area.

After the issue of his declaration and recommendations the Administrator must wait sixty days before putting his recommendations into effect. If, in his sole and unfettered judgment, stabilization has not been accomplished, he may then, by regulation or order, establish such maximum rent or maximum rents as "in his judgment" will be "generally fair and equitable and will effectuate the purposes of this Act." His order may be based upon nothing but his own opinion. It may be made without notice, without hearing, without inquiry of any sort, without consultation with local authorities. The rents established may vary from street to street, and from subdivision to subdivision, all in accordance with the Administrator's personal judgment. The order may involve classification and exemption if the Administrator, in his sole discretion, deems that this course will "effectuate the purposes of this Act". Which means, of course, if he thinks non-speculation, non-abnormality, or sufficient warrant justifies the discriminations involved.

How shall he fix the amount of the maximum rent? The only standard given him is the exercise of his own judgment that the rents fixed will be "generally fair and equitable and will effectuate the purposes of this Act." "Fair and equitable" might conceiv-

ably be a workable standard if inquiry into the specific facts were prescribed and if the bearing of those facts were to be given weight in the ultimate decision, but the addition of the word "generally", and the failure to prescribe any method for arriving at what is fair and equitable leaves the Administrator such room for disregard of specific injustices and particular circumstances that no living person could demonstrate error in his conclusion. And, again, even the phrase "generally fair and equitable" is qualified by empowering the Administrator to consider also questions of speculation, unwarranted action or abnormality of condition. Such a "standard" is pretense. It is a device to allow the Administrator to do anything he sees fit without accountability to anyone.

But, it is said, this is an unfair characterization of the statute because, "so far as practicable", the Administrator must ascertain and duly consider rents prevailing for "such accommodations, or comparable accommodations, on or about April 1, 1941", and that, although he may pick out some other period which he thinks more representative, he must not select any period earlier than April 1, 1940, and, therefore, he is definitely confined and prohibited in exercising control over rentals. This argument will not do. The mere fact that he may not go to any period for comparison earlier than April 1, 1940, although he may take any later period he thinks appropriate, does not serve to obliterate the fact that after such wide and unrestricted choice of a period he can make any regulation he sees fit.

Without further elaboration it is plain that this Act creates personal government by a petty tyrant instead of government by law. Whether there shall be a law prescribing maximum rents anywhere in the United States depends solely on the Administrator's personal judgment. When that law shall take effect, how long it shall remain in force, whether it shall be modified, what territory it shall cover, whether different areas shall be subject to different regulations, what is the nature of the activity that shall motivate the institution of the law,—all these matters are buried in the bosom of the Administrator and nowhere else.

I am far from urging that, in the present war emergency, rents and prices shall not be controlled and stabilized. But I do insist that, war or no war, there exists no necessity, and no constitu-

tional power, for Congress' abdication of its legislative power and remission to an executive official of the function of making and repealing laws applicable to the citizens of the United States. No truer word was ever said than this court's statement in the *Minnesota Mortgage Moratorium, Case²* that emergency does not create power but may furnish the occasion for its exercise. The Constitution no more contemplates the elimination of any of the coordinate branches of the Government during war than in peace. It will not do to say that no other method could have been adopted consonant with the legislative power of Congress. "Defense-rental areas" and "defense activities" could have been reasonably defined. Rents in those areas could have been frozen as of a given date, or reasonably precise standards could have been fixed, and administrative or other tribunals could have been given power according to the rules and standards prescribed to deal with special situations after hearing and findings and exposition of the reasons for action. I say this only because the argument has been made that the emergency was such that no other form of legislation would have served the end in view. It is not for this court to tell Congress what sort of legislation it shall adopt but, in this instance, when Congress seems to have abdicated and to have eliminated the legislative process from our constitutional form of Government, it must be stated that this cannot be done unless the people so command or permit by amending the fundamental law.

The obvious answer to what I have said is that this court has sustained, and no one would now question, the constitutional validity of Acts of Congress laying down purported standards as vague as those contained in the Act under consideration. But the answer is specious. Generally speaking, statutes invoking the aid of the administrative arm of the Government for their application and enforcement fall into two classes,—those in which a policy is declared and an administrative body is empowered to ascertain the facts in particular cases so as to determine whether that policy in a particular case had been violated. Of this type of legislation the Interstate Commerce Act and the Federal Trade Commission Act are classical examples. In the one, carriers are required to charge just and reasonable rates for their services. In the other citizens are forbidden to indulge in unfair methods

² *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, 425, 426.

of competition. If it be asserted that these are but vague standards of conduct it must at once be said that, in adopting them, Congress adopted common law concepts, the one applying to those pursuing a public calling and the other to business competitors in general, and that the standards announced carried with them concepts and contours attaching as a result of a long legal history. But more, in such instances, the standards were not to be applied in the uncontrolled judgment of the administrative body. On the contrary, the statutes require a complaint specifying the conduct thought to violate the statute and opportunity for answer, for hearing, for production of evidence, and for findings which are subject to judicial review. With such a background for administrative procedure what seems a loose and vague standard becomes in fact a reasonably ascertainable one that can fairly, equitably, and justly be applied.

The other and distinct class of cases is that in which Congress, as in the present instance, declares a policy and entrusts to an administrative agent, without more, the making of general rules and regulations for the implementation of that policy. These rules are, in all but name, statutes. Here, unless the rule for the guidance of the Administrator is clear, and the considerations upon which he may act are definite and certain, it must inevitably follow that, to a greater or less degree, he will make the law. No citizen can question the motive or purpose of Congress in enacting a specific statute to control and define conduct as long as Congress acts within the powers granted it by the Constitution. As has been pointed out, Congress, in passing the Emergency Price Control Act, has attempted to clothe its delegate—an Administrator—with the same unchallengeable legislative power which it possesses. In this respect the delegation is no different from that involved in the National Industrial Recovery Act which was held invalid in *A. L. A. Schechter Poultry Corp. v. United States*, *supra*.

We are told that "Congress has specified the basic conclusions of fact upon the ascertainment of which by the Administrator its statutory command is to become effective." This means, I take it, that the Administrator need find no facts, in the accepted sense of the expression. He need only form an opinion,—for every opinion is a conclusion of fact. And "basic" means, evidently, that his opinion is that one of the "purposes of the Act" requires the

making of a law applicable to a given situation. It is not of material aid that he discloses the reasons for his action. Such a test of constitutionality was unanimously rejected in the *Schechter* case.

The statute there in question declared the policy of Congress to be "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Under that Act the President was required to find that the promulgation by him of a code of fair competition in any industry would "tend to effectuate the policy" of Congress as above declared. He did so find in promulgating the code there under attack.

I have already quoted what this court said with respect to the so-called standards established by the statute. That case and this fall into exactly the same category. There it was held that the President's basic conclusions of fact amounted to an exercise of his judgment as to whether a law should come into being or not. Here it is said that the Administrator's basic conclusions of fact are but the enforcement of an enactment by Congress. Whether explicitly avowed or not, the present decision overrules that in the *Schechter* case.

The judgment of the Administrator is, by this Act, substituted for the judgment of Congress. It is sought to make that judgment unquestionable just as the judgment of Congress would be unquestionable once exercised and embodied in a definite statutory proscription. But Congress, under our form of Government, may not surrender its judgment as to whether there shall be a law, or what that law shall be, to any other person or body.

The Emergency Price Control Act might have been drawn so as to lay down standards for action by the Administrator which would be reasonably definite; it might have authorized inquiries and hearings by him to ascertain facts which affect specific cases within the provisions of the statute. That would have been a constitutional and practicable measure. It has done no such thing.

But it is said the Administrator's powers are not absolute, for the statute provides judicial review of his action. While the Act purports to give relief from rulings of the Administrator by appeal to the Emergency Court of Appeals and to this court, the grant of judicial review is illusory. How can any court say that the Administrator has erred in the exercise of his judgment in determining what are defense activities? How can any court pronounce that the Administrator's judgment is erroneous in defining a "defense-rental area"? What are the materials on which to review the judgment of the Administrator that one or another period in the last three years reflects, in a given area, no abnormal, speculative, or unwarranted increase in rent in particular defense housing accommodations in a chosen defense-rental area? It is manifest that it is beyond the competence of any court to convict the Administrator of error when the supposed materials for judgment are so vague and so numerous as those permitted by the statute.

One only need read the decisions of the Emergency Court of Appeals to learn how futile it is for the citizen to attempt to convict the Administrator of an abuse of judgment in framing his orders, how illusory the purported judicial review is in fact. I have spoken more at length on this subject in my opinion in *Yakus v. United States*, No. 374.

I think the judgment of the District Court was right and should be affirmed.